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## COPYRIGHT ARBITRATION ROYALTY PANEL

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## ORAL ARGUMENTS

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In the Matter of:  
Distribution of 1993, 1994,  
1995, 1996 and 1997 Cable  
Royalty Funds

Docket No. 2000-2  
CARP CD 93-97

Monday,  
December 11, 2000

The oral arguments took place at 3:00 p.m., in Room 414 of the Library of Congress' Madison Building, 101 Independence Avenue, S.E., Washington, D.C. 20559.

## BEFORE:

THE HONORABLE DOROTHY K. CAMPBELL, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE MARK J. DAVIS

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P-R-O-C-E-E-D-I-N-G-S

(3:10 p.m.)

JUDGE CAMPBELL: We welcome you, Gary, helping us today. We appreciate both sides getting together and giving us enough paper to start the Russian War.

First, we have some preliminary matters. One is -- and Gary, make sure you get this down, the hearing was to have started this morning and by agreement of the parties we did reschedule it to 3 o'clock.

In addition to that, I would like to say that I hope we can continue the spirit of cooperation that was evidenced by the scheduling hearing. And I charge each one present to remember that the trust invested in you by the claimants you represent is something to bear in mind at all times while you're here. Do not, in moments of passion, with regard to the points that you are presenting, overlook the best interest of the claimants. They are the ones who have engaged you to serve here today.

Also, I urge you to realize that the final

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1 outcome of these proceedings will be a reality for  
2 your clients with respect to the 1997 proceeds and  
3 quite possibly regarding claims in the future.

4 I caution you, as you map the future path  
5 regarding these royalty issues at hand to bear that in  
6 mind.

7 We expect full respect and professional  
8 decorum throughout these proceedings and I know we  
9 will get it. It was graciously evident during the  
10 prior hearing and I appreciate that and so does the  
11 rest of the Panel.

12 Our time is limited and precious. It is  
13 therefore critical that all persons involved stay  
14 focused on the issues and don't get lost in your  
15 passions.

16 We are going to take a break somewhere  
17 between 4:15 and 4:45 unless all here feel that we can  
18 charge forth and spend a little more time dealing with  
19 the issues. Sometimes those breaks are critical to  
20 allow you to think away from the moment and get back  
21 to the point at hand.

22 If the parties wish to have additional

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1 moments for private discussions, please let us know  
2 and that might be just among yourselves as  
3 representatives or with your clients, depending on  
4 what you feel is necessary at the time. Do this so in  
5 an appropriate manner and we do not expect to endure  
6 on anybody's behalf unnecessary interruptions during  
7 any testimony today or at any other time. Remember,  
8 please, the time frame is very tight. We have 180  
9 days and many of those days have already passed.

10 And please, remember, that all parties  
11 here deserve a full and fair opportunity to be heard  
12 and it is our charge to allow that to happen.

13 If you will look at your scheduling  
14 outline the first item for oral testimony today is the  
15 Motion to Reconsider. Unless there are preliminary  
16 items by the parties -- that motion was made by the  
17 MPAA.

18 MR. TUCCI: Thank you. As a preliminary  
19 matter, I know we have three hours allotted today. If  
20 it's close and we have tomorrow as well. If it's  
21 close, to be completed today, we're perfectly willing  
22 to stay and get this completed today in order to give

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1 you all the time tomorrow to decide these matters. I  
2 just wanted to state that for the record.

3 I'm Michael Tucci on behalf of the  
4 Programs Suppliers. With me is Greg Olaniran and Jim  
5 Popham who is the Vice President of MPAA and who has  
6 also entered an appearance in this matter.

7 This is our motion. It's our motion,  
8 renewed motion to dismiss and a motion to reconsider  
9 this Panel's order of November 15th, 2000.

10 Before I delve straight into it, I think  
11 it's very important to understand the context in which  
12 we bring this motion. We filed this motion  
13 originally, filed the motion to dismiss in May of  
14 2000. After we realized that none of the parties who  
15 are identified as Exhibit D claimants on the direct  
16 testimony of IPG are actual claimants in this  
17 proceeding. None of them filed claims. It's also  
18 apparent and I think undisputed in the record that  
19 WSG/IPG is not an actual claimant or not a bona fide  
20 claimant as well, being not an owner or a distributor  
21 of a copyrightable program.

22 When we filed it, we received an order

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1 from the Copyright Office which I think acknowledges  
2 the lack of validity of the IPG/WSG claim, but gain IP  
3 and WSG an opportunity to fit into an exception  
4 practice, specifically for this case.

5 What's important -- and we disagree with  
6 the exception, let me state that for the record. And  
7 I'll get more to that in the future in just a minute,  
8 but the important thing, I think for purposes of this  
9 motion today is to understand that the criteria that  
10 the Copyright Office placed on IPG with respect to  
11 complying with this special IPG exception and the  
12 criteria which is outlined on page 7 of the June 22nd  
13 order was number one that IPG has the burden of proof  
14 on the issue of representation.

15 And the second thing is the manner of  
16 proof, the items of proof that the Copyright Office  
17 felt were appropriate in order to prove  
18 representation. And those items are clearly set forth  
19 in the order. Just a quote from the order, it says  
20 "proof must be in the form of written agreements and  
21 representation between IPG and each of the Exhibit D  
22 parties executed on or before July 31, 1998." What is

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1 very important to remember is it's written agreements  
2 and they must be executed before July 31, 1998 and IPG  
3 has the burden of proof on that issue.

4 After receipt of this order, because  
5 viewing the representation agreements and the other  
6 discovery items that IPG had provided to the Program  
7 Suppliers, we could tell that they could not comply  
8 with the burden established by the Copyright Office,  
9 we move for additional discovery because anticipated  
10 and I might add correctly so, that IPG would attempt  
11 to introduce other documents in order to prove  
12 representation agreements that fit within the criteria  
13 established by the Copyright Office.

14 That motion was dismissed without  
15 prejudice because in their response IPG said we're not  
16 going to produce anything new. What you see is what  
17 you get. We think that we have established  
18 representation within the criteria based on the record  
19 before the items that have been produced in discovery.

20 What could we do but just go on. So  
21 that's what we did. But about a month after that, I  
22 think IPG realized the error of their ways and they

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1 filed a motion to amend the June 22nd order of the  
2 Copyright Office. That motion said well, we shouldn't  
3 be restricted to the items of proof that you have  
4 restricted us to.

5 We should be allowed to put forth  
6 correspondence, memoranda, affidavits, oral testimony  
7 and again, very importantly, while we don't agree with  
8 the exception created, the criteria established in the  
9 Copyright Office's order of September 22nd gave them  
10 a bit of leeway, but it basically dismissed out of  
11 hand the notion that unwritten agreements, after the  
12 fact documents, correspondence in those matters, could  
13 be used to prove representation. It reiterated the  
14 notion that representation had to be in the form of  
15 written agreements, that IPG had the burden of proof  
16 of that representation and that the documents proving  
17 that representation had to exist prior to July 31,  
18 1998.

19 A series of conference calls occurred  
20 after that and IPG came forward with what we called,  
21 and I think in our papers we called the October 10th  
22 documents.

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1           The October 10th documents are at, as I  
2 understand it, in IPG's view an attempt to comply with  
3 the Copyright Office's written criteria. Just so the  
4 Panel is aware, we filed last week a renewed motion  
5 for additional discovery. That's basically a renewal  
6 of the motion that I talked about that was dismissed  
7 by the Copyright Office.

8           The reason we did that is because we fully  
9 believe there are additional documents that are  
10 relevant to the issue of the representation  
11 agreements. If you look at the October 10th  
12 documents, in every instance the argument is made is  
13 that they tend to prove representation within the time  
14 frame required by the Copyright Office.

15           It's our belief that there are additional  
16 documents which would probably tend to disprove that.  
17 None of those have been produced. We're entitled to  
18 those documents. To the extent that these claims go  
19 forward, we are entitled to those documents. I just  
20 want to bring that to the Panel's attention. If  
21 that's out there, it's an additional motion. We can  
22 argue it today or we can save it for another day.

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1                   Now, as I stated, we disagree with the  
2                   special IPG exception to the statutory requirements.  
3                   One thing though that is clear is that this can be  
4                   decided on the basis of the papers that are before  
5                   you. The Copyright Office has specifically excluded  
6                   oral testimony. And there's no testimony that can be  
7                   taken on these particular issues. You need to look at  
8                   the documents.

9                   You need to look at what has been  
10                  presented and make a determination. We believe once  
11                  you make that determination, once you do that review  
12                  you will see that IPG cannot, with the matters that  
13                  are before you, make your burden of proof.

14                 JUDGE COOLEY: Quick question and then you  
15                 can go on. But does that also relate to your  
16                 representation agreements?

17                 MR. TUCCI: We're in vastly different  
18                 situations.

19                 JUDGE COOLEY: All right.

20                 MR. TUCCI: I'm glad you asked that  
21                 question.

22                 JUDGE COOLEY: Fine. We can argue it

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1 later, if you want in connection with another motion.

2 MR. TUCCI: And I will do that, but just  
3 to briefly answer the question, we filed the claims.  
4 There is no reason for there to be a Copyright Office  
5 exception with respect to the Program Suppliers. We  
6 are 112 claimants with numbers that have been stamped  
7 on them by the Copyright Office. We have no claimants  
8 over here.

9 JUDGE COOLEY: All right. I just wanted  
10 to get that clear. You can go on.

11 MR. TUCCI: Now again, the hearing will  
12 add nothing. There is no reason to have oral  
13 testimony. There is no reason to have written  
14 testimony. All of that has been specifically excluded  
15 by the Copyright Office.

16 The other point that I would like to make  
17 and one of the points that we make in our papers as  
18 well is that you have been charged with the decision  
19 of whether these are valid claims by way of our motion  
20 to dismiss and whether the Exhibit D parties then IPG  
21 have established their burden of proving  
22 representation under the Copyright Office's criteria.

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1 And just to note for the record, in the same order,  
2 the June 22nd order that the Copyright Office created  
3 the IPG exception in, in another part of the order  
4 they said that the timely submission of a claim is a  
5 statutory requirement. We lacked authority to waive  
6 that requirement. But that's precisely what they did  
7 in creating the IPG exception. They created this  
8 exception which in effect waives the statutory  
9 requirement.

10 The statute is extremely clear. The  
11 statute requires that in order to participate in the  
12 1997 royalty proceeding that the claimants file a  
13 claim within the time period prescribed by law which  
14 here was July 31, 1998. No claim, no valid claim was  
15 filed on behalf of any of the Exhibit D parties. The  
16 Copyright Office so found.

17 The other thing that I think is important  
18 that we cannot lose sight of is the statute also  
19 creates a mechanism for payment of royalties and it  
20 says that the payment of royalties shall be to  
21 claimants who have filed.

22 So even if you accept the IPG special

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1 exception created by the Copyright Office, if you  
2 render a ruling that says they get X dollars, I don't  
3 think the Copyright Office can pay it because the  
4 statute says they're claimants. They're not  
5 claimants. It's totally undisputed that they're not  
6 claimants. Claimants -- I don't know -- it's not a  
7 defined term in the statute, but we certainly know  
8 what a claimant is. A claimant is somebody who files  
9 a claim with the Copyright Office with a stamp on and  
10 it's filed within a particular time.

11 Now getting to the exception itself, we  
12 have the requirement of written proof, oral testimony  
13 doesn't work. We have the requirement that it's clear  
14 and unambiguous that there is a written representation  
15 agreement prior to July 31, 1998 and the document had  
16 to exist. When viewing each of these representation  
17 agreements in the documents surrounding them you need  
18 to ask one specific question, what document  
19 establishes that this agreement was executed prior to  
20 August 1998 and I submit for every one of those  
21 representation agreements there is not a document  
22 which you could answer the question affirmatively that

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1 it existed prior to August of 1998.

2 Now in our papers we go through each one  
3 of these, mostly in our reply that was filed last  
4 week. In response to WSG and IPG's castigation that  
5 we hadn't identified all of the deficiencies, we go  
6 ahead and identify all of the deficiencies and I'm  
7 prepared to do that for each and every one, but I  
8 probably thing it's more appropriate use of time just  
9 to give you some examples.

10 But before I do that it is extremely  
11 important to recall the burden that is placed on IPG.  
12 It's no you all guessing whether this representation  
13 agreement was executed prior to a particular point in  
14 time. It's not you surmising it. You have to see a  
15 piece of evidence that says this document existed  
16 prior to August 1998. If you cannot find that piece  
17 of evidence they fail to sustain their burden and you  
18 must dismiss the claim.

19 Now as I said I have some examples and  
20 these are the documents that are the October 10th  
21 documents. The representation agreements with the  
22 October 10th documents and I just want to go through

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1 a couple of them. I have copies for everybody. If  
2 everybody would like to see the documents together,  
3 but we talked in our papers about the presumption that  
4 was created by the use of this "as-of" language and I  
5 think it's actually correct statement of law that the  
6 use of the "as-of" language in these representation  
7 agreements leaves you with no other conclusion than it  
8 was -- that it was executed at some time other than  
9 this "as-of" date. I think that's a legal presumption  
10 that you can make clearly.

11 That presumption is in this case  
12 conclusively proven by two facts. One, every  
13 representation agreement that has an execution date on  
14 it has a date that's different than the "as-of" date.  
15 And it's later. Every October 20th document that  
16 relates to the execution of the agreement conclusively  
17 establishes that the document was executed after the  
18 "as-of" date. For example, the Tide Group is the  
19 first one. The Tide Group has a representation  
20 agreement that's dated --

21 JUDGE CAMPBELL: I have one question.

22 MR. TUCCI: Yes.

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1 JUDGE CAMPBELL: Do you need copies of  
2 what he has?

3 MR. TUCCI: I have copies.

4 JUDGE CAMPBELL: You had copies. I just  
5 want to make sure everybody got a copy. I think you  
6 need to present everybody a copy so that we can get it  
7 in the record.

8 MR. TUCCI: Sure.

9 (Pause.)

10 I don't want to burden you with a  
11 tremendous amount of paper, but as I stated just by  
12 way of an example, we have the Tide Group  
13 representation agreement which is the first document  
14 and it's dated as of June 30, 1998.

15 In the October 10th document which -- I  
16 think it's pretty much towards the back. I'll find  
17 exactly where it is.

18 (Pause.)

19 We have a July 8, 1998 letter which is  
20 about -- I'm sorry there's not any tabs in here. I  
21 think it's seven pages from the back. And it says --  
22 it's dated July 8, 1998, as I said. "Per our

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1 conversation this morning, attached is a revised  
2 version of the agreement previously forwarded to you."  
3 Obviously, the agreement was not in existence on the  
4 date -- the "as-of" date. But at some time  
5 thereafter.

6 But the problem is there's no evidence in  
7 front of you for you to make the determination as to  
8 when the agreement was executed. Because of that lack  
9 of evidence there is a failure in the burden of proof,  
10 specifically, a failure in the burden of production to  
11 produce evidence conforming to the criteria of the  
12 Copyright Office to establish the fact of  
13 representation. Without that you can't find that this  
14 is a valid -- that this validly meets the IPG  
15 exception.

16 The second example, and I'm not going to  
17 go through everyone unless you would like me to go  
18 through every one, but I'm happy to. I think three  
19 will do it.

20 The Golden Films is dated -- the  
21 representation agreement is dated as of June 20, 1998.  
22 Again, I didn't pick out these examples in any sort of

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1 order, but then again we have a letter in the October  
2 10th documents dated -- it's actually a fax cover  
3 sheet, dated June 22, 1998. It is the first of the  
4 October 10th documents saying "pursuant to your fax of  
5 June 19th attached will you please find red line and  
6 execution copies between the parties. If it meets  
7 with your approval, please have two copies of  
8 representation agreement signed by the appropriate  
9 authorized signatories." There is no evidence in the  
10 record that this agreement was ever signed or that it  
11 was signed prior to July 31, 1998. Without that  
12 evidence, you cannot find that IPG satisfied the  
13 burden placed on it by the Copyright Office.

14 Another example is the United Negro  
15 College Fund. We have a representation agreement  
16 dated as of July 30, 1998. We have a letter in  
17 October 10th documents dated November 1998, the first  
18 October 10th document. It says "per your request,  
19 enclosed please find four originals of the agreement  
20 partially executed by Worldwide Subsidy Group."  
21 Obviously, the agreement was not executed.

22 We also have a letter on letterhead of

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1 Worldwide Subsidy Group which is about seven  
2 documents, seven pages from the back dated July 30,  
3 1998 from Worldwide Subsidy Group to Mr. Allen of the  
4 United Negro College Fund. And it does have a  
5 signature of somebody from the United Negro College  
6 Fund, but again, there's absolutely no evidence before  
7 you that this document was sent prior to August 1998,  
8 that it was received by UNCF prior to August 1998 or  
9 most importantly, that it was signed by them prior to  
10 August 1998. Without that evidence, IPG fails to  
11 sustain its burden.

12 Those are three examples. Each one of the  
13 documents or group of documents that comprise the  
14 October 10th documents for each of the representation  
15 agreements has similar failings and we point all of  
16 them out in our papers. And like I said, I'd be happy  
17 to go through each one, but I think the record will  
18 establish those facts.

19 Now, there's a very important group that's  
20 a little bit different and that group is the group of  
21 representation agreements that don't have October 10th  
22 documents. Again, we think they probably exist and

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1 we're trying to get them through our motion, but none  
2 have been produced up to this point. But you have to  
3 ask yourself the question with respect to those  
4 agreements is what evidence do you have in front of  
5 you that establishes when those agreements were  
6 executed. You have nothing, zero. You have an  
7 "as-of" date. We've established through the pattern,  
8 practice and presumption that the "as-of" date is not  
9 the execution date. And therefore, again, with  
10 respect to all of those agreements, they have failed  
11 in their burden.

12 Now finally, with respect to our motion to  
13 dismiss we set forth additional factual issues. I'm  
14 not going to argue each of those factual issues in  
15 detail. I'd be happy to answer any questions that the  
16 Panel has with respect to those issues, but I think  
17 that those are adequately outlined in our brief as  
18 well.

19 There's the issue of the representation,  
20 just for example, of Mr. Lacy because the Lacy folks  
21 actually were claimants, but we have a difference of  
22 opinion as to who represents them, those types of

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1 factual disputes.

2 JUDGE CAMPBELL: On the Lacy, for our  
3 education here, is MPAA claiming Lacy as being  
4 represented under the MPAA as part of their joint  
5 claim?

6 MR. TUCCI: Yes. MPAA does not have a  
7 joint claim. We represent claimants that have filed  
8 their own claim.

9 JUDGE CAMPBELL: Okay.

10 MR. TUCCI: There's a big difference.  
11 Yes, and Lacy --

12 JUDGE CAMPBELL: Because Lacy is a  
13 separately filed valid claim. Our order just  
14 indicated they weren't under the joint claim.

15 MR. TUCCI: And we think that's right.  
16 They are a separate and valid claimant in these  
17 proceedings. The question is who represents them.  
18 And our original motion to dismiss we actually  
19 attached a letter from Mr. Lacy saying MPAA represents  
20 us. I have engaged WSG/IPG to engage us in a  
21 collection of international royalties, not domestic  
22 royalties. So that's the kind of factual issue that

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1 I'm alluding to that we have discussed with respect to  
2 I think three or four or five, maybe even, of the  
3 claimants regarding, that are claimed by IPG.

4 Finally, we think when you look at the  
5 criteria that's established, well, let me even back  
6 up. The first thing that you need to do is determine  
7 whether you agree with the creation of the IPG  
8 exception in the first instance. We believe that when  
9 you read the statute you look at the Library's order,  
10 you will come to the conclusion, as a matter of fact,  
11 the conclusion that you can come to is that they have  
12 no authority to create this exception and without  
13 authority to create the exception, the claims must be  
14 dismissed outright.

15 But even if you have a question with  
16 respect to their authority to create this exception,  
17 none of the Exhibit D parties comply with the  
18 exception. IPG can't comply with the exception with  
19 respect to the Exhibit D parties and therefore  
20 independently the claims must be dismissed.

21 If you have any questions I'd be happy to  
22 --

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1 JUDGE CAMPBELL: Mr. Tucci, I have one  
2 more question similar to Lacy with its claim. Litton  
3 Syndications. Is that a claim that MPAA feels is in  
4 its representation pool? You didn't address that.

5 MR. TUCCI: No, we don't.

6 JUDGE CAMPBELL: All right.

7 MR. TUCCI: I've had clarification.

8 JUDGE CAMPBELL: Because there were some  
9 questions about programs that were Litton programs on  
10 the exhibit 3 to MPAA's direct case.

11 MR. TUCCI: We may, just to be absolutely  
12 clear, we may have a situation where one of our  
13 represented claimants claims an entitlement to  
14 royalties for programs that appear on the Litton  
15 program list. We do not claim that we represent  
16 Litton as a member of the Program Suppliers.

17 JUDGE CAMPBELL: Yes. We realize that  
18 that's easy because of distribution agreements to  
19 happen, but we wanted that clarified.

20 MR. TUCCI: Right, and I think that there  
21 is a situation where a couple of -- is it the Sabin --

22 JUDGE CAMPBELL: Actually, there are -- I

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1 found items -- on Exhibit D of IPG, programs number  
2 22, 25, 16, 17, 18 and 24 were Litton programs at  
3 issue on both sides, had been listed on both sides.  
4 So Shaka Zulu and Story of the People you raised in  
5 yours, but then I found several others too.

6 MR. TUCCI: It may be a timing issue there  
7 as you're well aware. There may be a 1996 and 1997 --  
8 there may be different distributors for different  
9 years and that's why we have an overlap problem.

10 JUDGE CAMPBELL: Okay, I just wanted to  
11 get that clarified.

12 MR. TUCCI: We have not included, before  
13 I say something incorrect, I think that at least two  
14 of those, I think it's the two that you mentioned, we  
15 did include in our motion to dismiss as a factual  
16 matter as to who represented or who claimed  
17 entitlement to the royalties for those particular  
18 programs.

19 MR. OLANIRAN: I think if I recall  
20 correctly, that we probably pointed out was the  
21 deficiency in the assertion that WSG actually claims  
22 of that title, something to that effect. Would it not

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1 directly address the issue of any title that may or  
2 may not be in dispute between one of our claimants and  
3 one of their claimants.

4 JUDGE CAMPBELL: As we look, as we move  
5 further beyond this threshold issue and look at  
6 programs and look at the different methods of  
7 calculating royalties, that's something for both of  
8 you to take a look at. It might be something that  
9 easily you can decide that there's a way to resolve  
10 this without any difficulty and with distribution  
11 agreements quite often that is the case.

12 So there may be some stipulations when we  
13 get there, but I would just urge you to just take a  
14 look at that issue so that everybody's working off the  
15 same set of facts. It will make this a much more  
16 speedy process when it comes to looking at the final  
17 outcome which is the ultimate essence of this case.

18 MR. TUCCI: Thank you.

19 JUDGE CAMPBELL: Thank you.

20 JUDGE DAVIS: I just have one brief  
21 question. In your brief you discuss the Copyright  
22 Office creating the one time exception for IPG and you

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1 stated that the Library acted arbitrarily and exceeded  
2 the bounds of its authority as a federal agency.

3 I'd like you to speak for a moment as to  
4 what possible jurisdiction this Panel has to address  
5 that issue.

6 MR. TUCCI: The jurisdiction that you have  
7 in our view is the jurisdiction to make an independent  
8 determination about the validity of the claim and  
9 about the factual, whether IPG has factually fit into  
10 the exception.

11 I don't think that we're in a situation  
12 where as IPG has characterized it where this Panel is  
13 reviewing the decision of the Library or the Copyright  
14 Office. It's a situation where you are taking a fresh  
15 look. You're making your own determination whether  
16 this is a bona fide and valid claim and if they  
17 disagree, they disagree. You will then send that  
18 decision to the Copyright Office for determination and  
19 make a well-reasoned decision that you know we have  
20 taken a look at this and we have made a determination  
21 that it's somewhat at odds with yours based on a  
22 wealth of more information as well. You have a lot

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1 more in front of you than they have. I mean we have  
2 exchanged more documents. You've had much more  
3 argument and certainly, you can come to a different  
4 conclusion than they have.

5 I don't know that there's anything that  
6 jurisdictionally prohibits you from doing that and I  
7 think that's probably the way I would look at it.

8 JUDGE DAVIS: Okay, thank you.

9 JUDGE CAMPBELL: Mr. Lutzker, are you  
10 ready?

11 MR. LUTZKER: Thank you. My name is Arnie  
12 Lutzker and I'm counsel for Independent Producers  
13 Group. And I would like to say just right off the bat  
14 that these are issues that are very well briefed in  
15 the documents that you already have and I appreciate  
16 the opportunity for oral argument and we hope we can  
17 sort of zone in on areas of concern, but I'm  
18 comfortable that we have addressed in our court  
19 pleadings and MPAA has in its pleadings the primary  
20 issues.

21 And really, for purposes of the instant  
22 motion to dismiss the IPG claim, the way I understood

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1       their claim, it really is divided into two parts.  
2       This first part about legal authority of the Copyright  
3       Office to do what it did and then separately whether  
4       or not IPG by virtue of additional documentation,  
5       meeting the request of the Copyright Office to satisfy  
6       its obligations.

7               I'd like to also put in context which  
8       again I think is clear in the pleadings from both my  
9       experience and understanding and interpreting the  
10      Copyright Office's concerns in this area. First and  
11      foremost, the Copyright Office has on some occasions  
12      in the past dealt with the issue about a claimant that  
13      appears late on the scene and the concern which the  
14      MPA motion appears to address really goes to that core  
15      concern.

16             To what extent is a claimant arriving late  
17      on the scene, in other words, after July 31 of a  
18      particular year, referencing back to the prior year,  
19      to what extent is that claimant arriving late on the  
20      scene such that by virtue of statutory requirements,  
21      the Copyright Office should preclude the claim from  
22      even being heard.

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1                   Now fundamentally, we have a situation  
2 with IPG of an entity that has filed a claim. The  
3 issue is is the claim defective in certain respects  
4 which I'll get to in a minute, but there is no  
5 question that it did file on behalf of itself and the  
6 parties that it was representing, what it understood  
7 to be a timely proper claim under the rules of the  
8 Copyright Office.

9                   Now the Copyright Office in response to  
10 the concerns raised by the MPAA took a closer look and  
11 determined that the issue of what is a joint claim,  
12 because this is, in essence, what we're talking about.  
13 What is a joint claim. It's a matter that has not  
14 been necessarily fully litigated before the Copyright  
15 Office, fully understood, and it interpreted its own  
16 rules as having some ambiguity.

17                   It also indicated in the course of its  
18 ruling on this motion that it has -- it's a matter of  
19 first impression, that it doesn't know -- it knows  
20 that there have been joint claims filed in the past,  
21 but it doesn't know that all the parties that have  
22 filed joint claims in the past have, in fact,

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1 satisfied the obligations of the rules that they might  
2 want to interpret.

3 Therefore, it established what is  
4 characterized perhaps as a unique exception for IPG,  
5 but may have other applications to other parties in  
6 this proceeding and maybe in future years as we sort  
7 of are dealing with 1997 now. There may be parties  
8 that will benefit from the Copyright Office's  
9 interpretation issued in the Year 2000. So the  
10 calendar years 1997, 1998, and 1999 for which claims  
11 have already been filed may have the benefit of  
12 interpretation under this exception as defined by the  
13 Copyright Office.

14 Now fundamentally, and this is where,  
15 again, I believe it's addressed in our pleadings, but  
16 the fundamental core concept that we're dealing with  
17 here is the Copyright Office's willingness to issue an  
18 exception to an interpretation of its own rules. It  
19 issued the rules.

20 It's interpreting these rules and it's  
21 granting an exception. In fact, earlier in the case  
22 an exception was granted for the MPAA in connection

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1 with their filing of an intent to participate in this  
2 proceeding. There were some issues as to whether that  
3 was filed timely or not and the circumstances and the  
4 Copyright Office allowed the MPAA to file a waiver  
5 request which was granted. And, as a practical  
6 matter, IPG is not challenging that waiver request,  
7 but it puts in context that the Copyright Office is  
8 allowed to interpret its own regulations and this goes  
9 again to the authority that you were vested in.

10 I did interpret and maybe this latter list  
11 interchange with the Honorable Mr. Davis and counsel,  
12 raised a question of whether or not they are, MPAA, is  
13 asking for this Panel to overturn the rulings of the  
14 Copyright Office. There was certainly more than a  
15 whiff of that in the pleadings and that's the way I  
16 think it was fair to construe what they were asking  
17 for.

18 Clearly, from our perspective, the Panel  
19 under the statute is going to be following the  
20 statute, the orders of the Librarian, past CRT and  
21 CARP decisions. And it fits in that context if this  
22 is an order that we would anticipate the Panel to

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1       respect because ultimately, the Copyright Office and  
2       the Librarian of Congress is going to be reviewing  
3       your decision. You make the recommendations and it is  
4       the -- under the statute, it is the Librarian who  
5       makes the decision to accept or reject those rulings  
6       and to the extent it has already ruled on this issue,  
7       and interpreted its rules in terms of the definition  
8       of a joint claim, it has already issued an  
9       authoritaded opinion on that point.

10               And I might add that in the course of the  
11       MPA's commentary in this proceeding, it had  
12       opportunity to comment upon this order and in fact, it  
13       gave what I read to be a green light from a  
14       constitutional perspective with regard to the decision  
15       of the panel and it's quoted -- we quote, it's just  
16       really a couple of sentences that I'll reiterate.

17               It's on page 7 of our brief, but in one of  
18       the briefs filed by the MPAA responding to this order  
19       they said "there were no constitutional restraints on  
20       the Copyright Office's authority fashioning the ruling  
21       in this case to safeguard the processes from  
22       illegitimate claimants and conformity with copyright

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1 regulations is indisputable permissible."

2 We don't disagree with that and now from  
3 a policy point of view and I think this is important  
4 for the Panel to understand, from a policy point of  
5 view, the Copyright Office was fundamentally concerned  
6 in its order of June 22 that there be parties at the  
7 table participating in the claimed proceeding by July  
8 31st of the given year. That's the critical date.  
9 That's the critical concept. It says in its ruling in  
10 order to preserve the integrity of the rules, it is  
11 establishing the context in which it will grant an  
12 exception to the interpretation of the joint claim  
13 provision as filed by -- a joint claim is filed by  
14 IPG.

15 The preservation of the integrity of the  
16 rules goes to have these claimants that IPG represents  
17 participated in a material way, in an overt way, in a  
18 clear enough way that the Panel can say yes, they had  
19 authorized IPG prior to July 31 of 1998 to represent  
20 them in this very proceeding. Because what happened,  
21 by virtue of that authority, these entities did not  
22 file individual claims. They were in a situation of

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1 (a) knowing what they had to do, asking, committing,  
2 contracting with someone to do it in their stead and  
3 then not taking an action which would have otherwise  
4 allowed them to be in a position to make claim for  
5 royalties.

6 And so it's critical as you look at this  
7 that you recognize that there is a process that's gone  
8 forth. Part of the interpretation and I'd say it's  
9 really an interpretation that MPA wishes to impose on  
10 the agreements are that oh, these agreements by using  
11 a phrase dated "as-of" automatically, automatically  
12 presume that the claimants themselves had no  
13 relationship with IPG or actually the agreements are  
14 with WSG, had no relationship with WSG, Worldwide  
15 Subsidy Group, prior to July 31. They obviously came  
16 in later. Their interpretation of dated as-of, by  
17 definition their only definition means it's a back  
18 dating, even though Black's Dictionary not only  
19 defines it as back dating, it also is when agreements  
20 are signed in different places by the two parties or  
21 multiple parties to an agreement by the definition in  
22 Black's Dictionary.

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1 JUDGE COOLEY: Can I stop you there?

2 MR. LUTZKER: Sure.

3 JUDGE COOLEY: But then isn't it really  
4 ambiguous? I mean are we left with an ambiguous  
5 situation?

6 MR. LUTZKER: You are left with some  
7 ambiguity, I would agree. And the nature of clarity  
8 of these documents is not precise because we didn't  
9 have the benefit when the documents were being written  
10 of the interpretations and you know, what's come over  
11 these past number of months.

12 Obviously, claimants -- you would behoove  
13 claimants that want to file joint claims to identify  
14 every entity that they represent in a joint claim,  
15 even though the regulations have ambiguity.

16 But yes, there is ambiguity in that  
17 language and that's the purpose of these additional  
18 documents, what we call the October 10 documents are  
19 provided in a way to facilitate the Panel's  
20 understanding of the relationships that existed at the  
21 time the claims had to be filed. And in the case of  
22 only one of the 14 companies that are represented in

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1 connection with these claims, only one of them were  
2 there no documents that were afforded.

3 Now the documentation and remember, in the  
4 Copyright Office ruling, they didn't say we had to  
5 have the representation agreement as drafted by IPG  
6 signed. They were looking for, in effect, any  
7 document that evidenced by signature, by initials, the  
8 order speaks of initialing. It speaks of a minimum  
9 level of evidence to satisfy you that yes, there was  
10 a relationship, a legal relationship. Maybe all the  
11 terms were not there. IPG deals not only with the  
12 United States copyright market, it deals with an  
13 international copyright market. Maybe there are other  
14 terms to analyze. Maybe even there are some terms  
15 that go to the term of years that we're going to be  
16 represented. There may be terms that go to the method  
17 of accounting and payments. There may be other  
18 arrangements to be made. The critical concern that  
19 you have that the Copyright Office charged you with is  
20 figuring out did these entities who are for other  
21 purposes valid claimants, did they participate  
22 sufficiently in an understanding with IPG such that

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1 you can make a judgment and say yes, by July 31, there  
2 was enough of a legal relationship, a legal, binding,  
3 contractual relationship. Forget all the critical  
4 elements of term and how much he may be paid. There  
5 are critical elements and these critical elements are  
6 -- and are you going to file my claim on my behalf?  
7 That's the critical relationship. If that's  
8 established, the concern of the Copyright Office with  
9 regard to the July 31 date is met in our view because  
10 what it means is that yes, there was a relationship  
11 between a claimant and an entity filing the claim and  
12 the failure to list these 15 entities on a sheet of  
13 paper attached to the claim which is the essence of  
14 the defect of this claim. It's not that agreements  
15 don't exist. There obviously are agreements. The  
16 agreements have ambiguities, we admit that. It is  
17 that the claim itself did not list the 15 parties, the  
18 14 parties that it had relationships with even though  
19 it had agreements and understandings with that. And  
20 the nature of the representation agreements themselves  
21 are ones -- I do want to provide additional commentary  
22 on, but that remains the critical concern of the

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1 Panel. Can you discern from the material that was  
2 submitted on October 10th whether there was a  
3 relationship sufficient in your judgment to say that  
4 a party that could have filed a claim did not file it  
5 and authorized Worldwide Subsidy Group to make that  
6 filing. That's the critical concern. And the  
7 Copyright Office because -- and our view is pointed  
8 out in earlier documents and one of the unique aspects  
9 of this case is that you'll see depending upon the way  
10 the wind blows, arguments that are made on one side of  
11 the table also have applicability to the other side of  
12 the table. The question of oral agreements. We had  
13 made an argument to the Copyright Office. The law  
14 allows for oral understandings. There's nothing  
15 unusual about oral understandings. And there is  
16 nothing illegal about an entity, Tide Group, orally  
17 advising Worldwide Subsidy Group, you represent me.  
18 If Worldwide Subsidy Group puts Tide Group on an  
19 attachment, even though there's no written agreement,  
20 that would satisfy the Copyright Office's concern.

21 JUDGE CAMPBELL: Except that -- I'm sorry.

22 JUDGE COOLEY: Go ahead.

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1 JUDGE CAMPBELL: Except that you must  
2 realize in this instance there was a special  
3 dispensation, if you will, provided that said it had  
4 to be in writing, signed and executed prior to July  
5 31, 1998.

6 MR. LUTZKER: I agree. That's the  
7 argument we made before the Copyright Office's ruling.  
8 In other words, we're saying before the Copyright  
9 Office ruled in June -- June 22nd, in our original  
10 briefing papers and response to the motion to dismiss,  
11 we argued you can take an oral agreement and it can be  
12 binding and in papers that MPA has submitted in the  
13 proceedings where we're criticizing their  
14 representation agreements they say well, you can take  
15 an oral agreement. Of course, you can. The law  
16 allows that.

17 The special issue here is the Copyright  
18 Office to preserve the integrity of the process of the  
19 July 31 filing date, to preserve that, impose an extra  
20 requirement on IPG and that's what unique, perhaps,  
21 although there may be others that need this as well.  
22 What is unique is they want it in writing because they

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1 said it has to be -- a filing is in writing, therefore  
2 we want to see a writing, something that comes from  
3 the pen of the claimant that IPG is representing. We  
4 want to see something in writing in order to preserve  
5 the integrity of the July 31 processing date.

6 JUDGE COOLEY: Do you have any other  
7 questions?

8 I just want to make sure I understand  
9 because this is critical to this argument here.

10 MR. LUTZKER: Sure.

11 JUDGE COOLEY: The words of the Copyright  
12 Office counsel was other documents signed or initialed  
13 by Exhibit D claimant can serve as written proof of  
14 representation provided that (1) they clearly and  
15 unambiguously provide that a representation agreement  
16 has been reached -- has been reached -- between IPG  
17 and Exhibit D claimant; and (2) the document existed  
18 on or before July 31, 1998.

19 Let me give you a hypothetical. I want to  
20 find out what you're really arguing. Are you arguing  
21 that there could have been a -- let's just say a blank  
22 agreement in place, one that you use maybe with

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1 several claimants or clients or customers, whatever  
2 you want to call it, okay? Are you making an argument  
3 that you had that in blank, that you had discussed  
4 it, that you had reached a representation agreement in  
5 principle anyway, but yet it was not technically  
6 confirmed until later in correspondence? Are you  
7 making the argument that that should qualify under the  
8 Copyright Office's criteria?

9 MR. LUTZKER: The Copyright Office wants  
10 something in writing.

11 JUDGE COOLEY: Right.

12 MR. LUTZKER: Yes, they want a  
13 representation agreement. It doesn't have to be the  
14 full two pages of this agreement as laid out by -- as  
15 initiated, I'll call it, by Worldwide Subsidy Group.  
16 It can be -- the agreement for representation does not  
17 have to be all these terms, but there has to be an  
18 agreement and it has to be in writing.

19 Now the evidence, first of all, all the  
20 agreements in question have the "as-of" date, so there  
21 is ambiguity, but then there is also a question of  
22 does the ambiguity without any additional testimony,

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1 without any additional, there's no evidence, for  
2 example, that the "as-of" date does not refer to  
3 faxing, does not refer to sending in different  
4 directions, from different cities. There is ambiguity  
5 there in the question in a motion to dismiss at this  
6 point whether you would construe, whether you would  
7 throw out a claimant in the MPA's words, "whether you  
8 would entirely dismiss the case" which we have  
9 questions about, given the Lacy situation. But under  
10 the circumstances, that you would entirely throw out  
11 a case on their sort of interpretation and we have an  
12 alternative interpretation. Our position is on that  
13 particular point, that if there is a factual dispute,  
14 the case goes forward, facts are collected and then  
15 the issue can be dealt with at a later point. You  
16 don't have to dismiss a case at this point.

17           Nevertheless, we feel that in addition,  
18 the documentation clearly and unambiguously  
19 establishes a relationship and how can I say that?  
20 Well, a couple of things. First of all, none of the  
21 parties involved, none of the parties involved filed  
22 an independent claim. From their perspective, they

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1 had an understanding that someone was doing it on  
2 their behalf or otherwise they would just forego the  
3 opportunity of the claim and I don't think there's any  
4 basis in the record to suggest that they would just  
5 normally forego the opportunity of the claim if  
6 there's money coming due to them.

7 Secondly, there is documentation and I  
8 think sufficient documentation as the Panel in its  
9 initial review of this material concluded, there is  
10 sufficient documentation to bring to closure the  
11 question of was there a sufficient degree of  
12 relationship prior to July 31 or July 31 or before,  
13 between the claimant and Worldwide Subsidy Group and  
14 I think the issues as presented -- that issue as  
15 presented with the material is answered in the  
16 affirmative. Yes, there was that relationship.

17 There are documents and I would perhaps  
18 just sort of take a look. It's intriguing, you know,  
19 as an example, that two of these documents, actually  
20 all three of the documents that were sort of just  
21 handed out, the Tide Group, this is dated as of June  
22 30, okay? Now reading it for IPG, worse case, as of

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1 June 30, gives us one more month to try to deal with  
2 this problem, the unartfulness of the drafting aside.  
3 We submitted documentation which we are satisfied  
4 addresses this issue. One of the things that you'll  
5 see which is the most lengthy of the documents is a  
6 detailed posting for period ending June 30, 1980.  
7 It's a general ledger which comes from the Tide Group.

8 JUDGE CAMPBELL: I have a question on  
9 that. The general ledger is titled New Lauderdale  
10 LLC. How does that allow us to relate it to the Tide  
11 Group?

12 MR. LUTZKER: I will get back to that.

13 JUDGE CAMPBELL: Okay, as long as you get  
14 back to it, forge ahead.

15 MR. LUTZKER: The documentation also  
16 provides, but in other words, the critical thing with  
17 respect to this documentation is that this is  
18 confidential documentation which a party would not  
19 send to anybody. It would be sent to someone with  
20 whom one has a particular type of relationship and we  
21 view that relationship to be consistent with the  
22 understanding of the representation.

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1 In addition --

2 JUDGE CAMPBELL: I have a question.

3 MR. TUCCI: Sure.

4 JUDGE CAMPBELL: How do the detailed  
5 postings for these various periods relate to each  
6 representation agreement? Just in brief. Check  
7 register --

8 MR. TUCCI: I'm advised these show ad buys  
9 for particular programming, so they are designed to  
10 assist one in identifying syndicated activities.

11 Now I would add and I'll get to the --  
12 I'll answer that other question after a break.

13 MR. ADKINS: Sure.

14 MR. TUCCI: In terms of the reference to  
15 the July 8, 1998 fax that was sent from Worldwide  
16 Subsidy Group to the Psychic Readers Network which is  
17 the d/b/a of the Tide Group, it speaks of -- this is  
18 dated July 8th. It speaks in terms of a fax. It  
19 speaks in terms of conversations that morning. It  
20 speaks in terms of a revision to a document and it  
21 speaks in terms of representation with respect to this  
22 Psychic Readers Network programming.

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1                   Now there are two or three things that are  
2 relevant. First, the agreement that is dated as of  
3 June 30 is a different document than the one that is  
4 attached here to this agreement which suggests that  
5 this document predates the faxed version sent, that  
6 this is a -- it's an on-going process of negotiations  
7 between Worldwide Subsidy Group and the individual  
8 claimants in terms of the nuances of the  
9 representation agreement, not to the core question of  
10 representation, but to issues as far as accounting,  
11 you'll see that the accounting and payment section has  
12 some different terminology and it goes to the issue of  
13 at what point has there been an agreement.

14                   And under any circumstances the date of  
15 July 8th, even taking this at its face value, the date  
16 of July 8th being faxed to the party and an agreement  
17 that is executed by the party as of the June 30th  
18 date. You'll notice too that the June 30th date is  
19 typed in in that agreement. I take this argument  
20 back. I was thinking about another agreement. This  
21 one is the same document. There was another document  
22 I was thinking about.

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1                   This document is faxed to the party for  
2                   July 8th. It is dated as of June 30th. There were  
3                   revisions to the representation well within the time  
4                   period. We have an executed agreement well within the  
5                   time period and communications between the parties  
6                   well within the time period including the provision of  
7                   the details for the postings for the programming. All  
8                   this is direct evidence of the relationship that  
9                   existed between Worldwide Subsidy Group and the  
10                  claimant prior to July 31st.

11                  With regard to the --

12                  JUDGE CAMPBELL: Keep going. I can ask  
13                  this overall, I think.

14                  MR. LUTZKER: Again, with regard to the  
15                  complaint that was made with respect to the Golden  
16                  Films finance, this agreement is an agreement dated as  
17                  of June 20th.

18                  There is a fax dated June 22nd.  
19                  Contemporaneous with the agreement, this is the one  
20                  that I was thinking of before that had some changes in  
21                  the actual text between a red line version and the  
22                  execution copy, but the circumstances of the signing

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1 of this agreement dated as of June 20th, together with  
2 the communications in June of 1998 clearly evidenced  
3 a relationship that existed before July 31st,  
4 satisfying the Copyright Office's concern that  
5 Worldwide Subsidy Group be representative of the  
6 claimant in a timely manner such that the integrity of  
7 the July 31st day is maintained.

8 JUDGE CAMPBELL: Let's talk about Golden  
9 Films. I have some questions on that one particularly  
10 with regard to who is Worldwide Subsidy Group? In the  
11 Golden Films agreement, Worldwide Subsidy warrants in  
12 Section 7, it's a California limited liability  
13 company. Now MPA raises some previous filings and the  
14 Secretary of the State of California does not list  
15 that limited liability company.

16 In addition, in the Library of Congress'  
17 order of 6/28 of this year, on page 1 there's a quote,  
18 "Raul Galaz states in his testimony that IPG is a  
19 separate entity from Worldwide Subsidy Group which  
20 filed the claim in this proceeding." And then IPG  
21 written direct case at 3. And then Program Suppliers  
22 see documents that show the corporate structure. IPG

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1 asserts that there are no such documents because IPG  
2 is a fictitious name for Worldwide Subsidy Group.

3 Then in your Independent Producers Group  
4 opposition to the motion to dismiss that was received  
5 at the Copyright Office on December 1, you are stating  
6 in your filed material here, "the MPAA knows and the  
7 record is quite clear" apparently to all but me "that  
8 Independent Producers Group is a fictitious business  
9 name for Worldwide Subsidy Group of Texas. Worldwide  
10 Subsidy Group of California is the entity that filed  
11 claim number 176 for 1997 cable rate transmission  
12 royalties."

13 Further it states that "the California and  
14 the Texas Worldwide Subsidy Groups are distinct legal  
15 entities. The Texas one is not a corporation, but it  
16 was created by articles of organization in 1999."

17 So why are we calling this party IPG if  
18 IPG Texas is the real and true IPG and not Worldwide  
19 Subsidy Group. I'm getting really confused between  
20 all of your --

21 MR. LUTZKER: There are two Worldwide  
22 Subsidy Groups.

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1 JUDGE CAMPBELL: Right. One is in  
2 California --

3 MR. LUTZKER: California is the one that  
4 --

5 JUDGE CAMPBELL: The filing party.

6 MR. LUTZKER: Right. Worldwide Subsidy  
7 Group of Texas was formed in 1999.

8 JUDGE CAMPBELL: Right. I've got that  
9 part.

10 MR. LUTZKER: And IPG and Worldwide  
11 Subsidy Group Texas are the same entity.

12 JUDGE CAMPBELL: Right, I've got that.

13 MR. LUTZKER: And IPG represents the claim  
14 of Worldwide Subsidy Group California.

15 JUDGE CAMPBELL: All right, that hadn't  
16 been clear. So the Texas corporation represents --  
17 which is IPG/WSG, represents the claim here of  
18 Worldwide Subsidy Group California which is an LLC or  
19 not?

20 MR. GALAZ: Can I speak? I'm Raul Galaz.  
21 Actually, in California it was first organized as  
22 Artist Collection Group LLC. It ultimately, we filed

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1 papers to make Worldwide Subsidy Group the fictitious  
2 business name in California for Artist Collection  
3 Group LLC and there are no Secretary of State filings  
4 for fictitious business names in California. Those  
5 are done on a county by county basis.

6 JUDGE CAMPBELL: It seemed confusing to me  
7 because the backup documents of October 10th showed a  
8 request by the Golden Films and American Films  
9 Investment Corporation, just for their purpose to know  
10 with whom they were dealing.

11 MR. LUTZKER: Right.

12 JUDGE CAMPBELL: And the response was that  
13 it was Worldwide Subsidy Group in California LLC. And  
14 as a result, that confusion had played out here.

15 MR. LUTZKER: And that was also clarified  
16 in terms of the short cutting of this for the most  
17 recent motions. It had been dealt with in earlier,  
18 both provisions of discovery documents and in the  
19 motion paper filed in May.

20 JUDGE CAMPBELL: So the IPG, WSG Texas is  
21 a separate corporation from the California -- separate  
22 entity, it's not a corporation. But is it a separate

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1 entity from the WSG California --

2 MR. LUTZKER: Correct.

3 JUDGE CAMPBELL: Which is, in fact, a  
4 fictitious name for a party that I believe withdrew  
5 earlier. Is that correct?

6 MR. LUTZKER: Yes.

7 JUDGE CAMPBELL: So if they withdrew, are  
8 they still in? I'm lost here. Didn't they withdraw  
9 at the beginning of the case?

10 MR. LUTZKER: The Worldwide Subsidy Group  
11 and there's a document, and the Golden Films, this may  
12 sort of help visualize it. Five pages from the back  
13 of what was just distributed. There is a fax cover  
14 sheet that says Worldwide Subsidy Group, FKA, formerly  
15 known as Artist Collection Group. Separately, there's  
16 also correspondence with Artist Collection Group.

17 The confusion, if you will, comes from the  
18 multiplicity of names associated with many of the same  
19 -- really pretty much the same players. In  
20 California, Artist Collection Group and Worldwide  
21 Subsidy Group are related entities in terms of Texas,  
22 Worldwide Subsidy Group and Independent Producers

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1 Group are related entities.

2 JUDGE CAMPBELL: I have a question. If  
3 you can refer to the order of June 22, on page 5 the  
4 Library states that "IPG states in its written direct  
5 case that Artist Collection Group has withdrawn its  
6 claim because it did not represent any copyright  
7 owners who programs who were being transmitted by  
8 cable systems during 1997." And that's IPG's direct  
9 case at 2. "This leaves Worldwide Subsidy Group as  
10 the sole identified claimant."

11 However, if as you say Worldwide Subsidy  
12 Group is a fictitious name or a DBA for Artist  
13 Collection Group, then it's withdrawn its claim which  
14 would mean that perhaps the WGS that's in Texas is the  
15 one, but that's not the one that's signed these  
16 representation agreements and I'm back to where I'm  
17 confused as to who is the IPG of the day. It's like  
18 that program, will the real IPG please stand up?

19 MR. LUTZKER: We know who the real IPG is.  
20 The real IPG is also known as the Worldwide Subsidy  
21 Group in Texas.

22 In terms of the claimants in California,

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1 the original claim was filed and let me just take, if  
2 I can bear with you for one second, just to confer and  
3 make sure my understanding is correct too.

4 JUDGE CAMPBELL: Why don't we take a  
5 break? It's almost 20 after. That will give you a  
6 chance to get into the other issue we wanted to  
7 discuss. Everybody can run and get water or whatever  
8 and we can do likewise and maybe come back at about  
9 4:35 and we won't make that a 45 minute break again.

10 MR. LUTZKER: Okay, great. Thank you.

11 (Off the record.)

12 JUDGE CAMPBELL: Thank you. And, again,  
13 please be seated. If you wish to take your jackets  
14 off, it's warm in here, feel free to do so.

15 All right, Mr. Lutzker.

16 MR. LUTZKER: Okay. I'll try to answer  
17 your two outstanding questions.

18 JUDGE CAMPBELL: Thank you.

19 MR. LUTZKER: The first is in terms of who  
20 is New Lauderdale, L.L.C.

21 JUDGE CAMPBELL: Right.

22 MR. LUTZKER: The answer is we're not

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1 sure, okay? This document was sent in response to a  
2 request to the Tide Group. It was provided directly  
3 from them. It was faxed. It's obviously confidential  
4 information from their files. It is conceivable that  
5 like -- if you look at the Tide Group agreement,  
6 you've got the Tide Group, Inc. d/b/a Psychic Readers  
7 Network. They probably operate under several  
8 different names, and this may be their -- New  
9 Lauderdale, L.L.C. may be their distribution  
10 collection arm or whatever, but it was not provided --  
11 again, these are documents that go back now to 1998,  
12 and they weren't obtained -- they were pulled from the  
13 records. We just delivered them as evidence that  
14 there was that relationship existing.

15 It was provided because it's highly  
16 confidential material. And the reasonable assumption  
17 that we made is that it comes from the Tide -- it was  
18 asked from the Tide Group. It comes from them; it's  
19 their documentation. That's all I can say about that.  
20 I mean, if at hearing it turns that it's useful to  
21 provide any more information between now and then,  
22 presumably we'd have the opportunity to clarify that.

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1 JUDGE CAMPBELL: Thank you.

2 MR. LUTZKER: In terms of the artist  
3 rights, the artist rights -- or the Artist Collection  
4 Group, Worldwide Subsidy Group, I think the way I  
5 would characterize it is that sometimes various sorts  
6 of organizations come up with a number of different  
7 names.

8 Now, in connection with the California  
9 corporation, the California entity, the Artist  
10 Collection Group, as a practical matter, when it  
11 entered into agreements, it typically dealt in foreign  
12 rights. And when it was dealing in domestic rights,  
13 Worldwide Subsidy Group was a signatory. At the time  
14 the claim was filed, it was unclear -- but they're the  
15 same entity. In other words, one is the corporate  
16 name and strikes deals for foreign rights. The other  
17 is the d/b/a and strikes deals for domestic rights.  
18 But they're the same operation.

19 It was thought at the time the claim was  
20 filed that some of the parties signing the  
21 international rights also have domestic rights, and  
22 therefore it was filed on behalf of Artist Collection

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1 Group and Worldwide Subsidy Group, even though they  
2 were the same -- technically the same entity, it was  
3 viewed in a more formal strict sense that I had  
4 contracts under one name and I had contracts under the  
5 other name. And that's why the two names were used.

6 When the direct case was being put  
7 together, the contracts for the Artist Collection  
8 Group were analyzed, and it was determined that they  
9 were indeed foreign contracts not domestic contracts.  
10 Therefore, the withdrawal of them as a seemingly  
11 separate entity -- I mean there's an unartfulness,  
12 obviously, about this, but withdrawal of them, it was  
13 not intended to sort of by their -- thereby dismiss  
14 their WSG named operation. It's really the same  
15 thing, and so the effort was made to clarify that  
16 we're really dealing with Worldwide Subsidy Group  
17 which is the domestic claims contracted for in this  
18 proceeding. And there are no, obviously no foreign  
19 claims. And, so that was the intent of the  
20 explanation in the direct case.

21 And, again, I think it is not an uncommon  
22 practice in media companies to have a multiplicity of

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1 names and sometimes keeping track of these can have  
2 some confusion. In our case, we have an entity that  
3 has chosen to operate under two different names: in  
4 California, the Artist Collection Group and Worldwide  
5 Subsidy Group; in Texas, Worldwide Subsidy Group and  
6 Independent Producers Group.

7 JUDGE CAMPBELL: Thank you.

8 MR. LUTZKER: I guess I'm trying to pick  
9 up --

10 JUDGE CAMPBELL: Pick up where you left  
11 off.

12 MR. LUTZKER: -- where I left off. And  
13 maybe the simplicity is primarily to summarize. The  
14 documents that have been provided, as I said, go to  
15 the nature of the relationship. I did want to sort of  
16 -- the other issue that's sort of been raised is this  
17 Negro College Fund, and again, the issue is for  
18 present purposes -- and again, the context in which  
19 the document we provided on October 10 were provided  
20 in as strict compliance as we could understand the  
21 Copyright Office's regulation or decision. What we  
22 tried to do was say here's a record of material that

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1 we have in our files that evidence the relationships  
2 that existed between Worldwide Subsidy Group and these  
3 14 entities.

4 The documents do not necessarily speak for  
5 themselves, and to some degree there can be confusion  
6 with respect to them, but these are the documents.  
7 The Copyright Office's concern was that there be a  
8 writing set prior to July 31 that establishes a  
9 relationship, and they wanted it in writing. They  
10 didn't want oral testimony to say, "I spoke to  
11 somebody. We had an oral deal, and therefore go  
12 ahead." We needed to provide writing.

13 The writings may require, and this is  
14 where I would differ with my good friend representing  
15 MPAA, I do not believe the Copyright Office prohibits  
16 IPG from offering oral testimony helping the panel to  
17 understand documentation. I do not believe the  
18 rulings of the Copyright Office would wish the panel  
19 to err in dismissing a claim where clarification or  
20 explanation will be apparent from a witness offering  
21 testimony.

22 The Copyright Office, because of its

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1 concern about the July 31 integrity of its rules,  
2 wanted something in writing. So, our record is fixed.  
3 We can't go beyond these documents. We can't say that  
4 on such and such date in May, July, July things  
5 happened. We have to speak from the documents, and we  
6 should be allowed to speak from the documents if you  
7 have a question.

8 Our view is that the agreements on their  
9 face satisfy the requirements. They raise ambiguity.  
10 The question is how do you interpret the ambiguities?  
11 In light of these additional documents, we feel that  
12 you made the correct decision with respect to most of  
13 these documents when you had your first crack at them.  
14 And we have no doubt that this may be matters that are  
15 additionally raised during the course of the hearing,  
16 but the acceptance of ten of these claimants by virtue  
17 of these documents we feel is correct.

18 With respect to the United Negro College  
19 Fund, I mean here you have a situation where there's  
20 correspondence, it's a faxed correspondence dated July  
21 30, it's agreed and accepted, and MPAA would have you  
22 believe that this document must be construed as being

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1 transmitted, executed, and delivered after August 1,  
2 and I don't see how they can do that. If you look on  
3 the face of this document, this is a faxed document;  
4 it is signed by both parties; it recognizes the  
5 authority of the Worldwide Subsidy Group. This is  
6 what the Copyright Office wanted. It could have been  
7 initialed; it's signed. It said, "We're confirming  
8 the understanding that you're going to represent us in  
9 this proceeding."

10 And the alternative would be to throw out  
11 this entity that we believe, manifested by the  
12 documents that are before you, has shown an intent, a  
13 willingness, and timely willingness to participate in  
14 this proceeding. And the only failing that its  
15 representative, WSG/IPG, is being accused of is not  
16 attaching a list to the claim that United Negro  
17 College Fund was one of the applicants its  
18 representing.

19 JUDGE CAMPBELL: I have a question. If  
20 you look at the July 30, 1998 letter to Bill Allen of  
21 the United Negro College Fund, the agreement accepted,  
22 as both parties have indicated, is not dated. But if

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1 you read carefully the November 20 letter, it does  
2 raise some issues. As I mentioned in our conversation  
3 after, "Dear Mr. Allen, Worldwide Subsidy Group is a  
4 company specializing in the application for and  
5 collection of audio-visual royalties distributed by  
6 governmental agencies. A more thorough description of  
7 our services exists in the letter previously sent to  
8 David Brokaw, previously forwarded to your office, and  
9 I attach that letter in the event that it is not at  
10 your disposal."

11 I haven't seen any previous letter to  
12 David Brokaw. It wasn't attached to this. But this  
13 paragraph appears to be an introduction of the  
14 services of Worldwide Subsidy. The second paragraph  
15 indicates that the deadline for receiving certain  
16 monies from one agency has passed, see the Brokaw  
17 letter, and then indicating that there are other  
18 deadlines that occur several times throughout the  
19 year. The next paragraph talks about the commission  
20 basis upon which the Worldwide Subsidy Group operates,  
21 including their fees and filings.

22 This November 20 letter very much sounds

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1 like we're introducing our services; we don't have a  
2 relationship; this is how we work.

3 MR. LUTZKER: Right. And what is  
4 explained is Worldwide Subsidy Group, as I indicated  
5 earlier, described in the Artist Collection Group,  
6 deals with international collections, not just the  
7 United States cable royalties; collections in France  
8 and Europe and Australia and Canada, Latin America and  
9 elsewhere. And that the ability to expand  
10 relationships is what this letter is dealing with.

11 In the case of the particular issue that  
12 you raised, there were Latin, South American claims  
13 that could have been missed in terms of deadlines.  
14 This deals with the international practice. The July  
15 30 letter clearly and unambiguously establishes a  
16 relationship with the Lou Rawls Parade of Stars and  
17 other projects by the United Negro College Fund.

18 So, it is a solicitation, but it's a  
19 solicitation of an expansion of business. Maybe it's  
20 unartfully done. Maybe it sounds like instead of --  
21 you know, let me go back for one second to this letter  
22 -- instead of saying, "Dear Mr. Allen," it should say,

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1 "Dear Bill, because now we're good chums because we're  
2 representing you." But the way people write letters  
3 does not necessarily create the ambiguities that are  
4 being imposed on them.

5 JUDGE CAMPBELL: Well, I'm not concerned  
6 so much of the form as the substance, and it appears  
7 that there is a question about when the agreed and  
8 accepted item would have been dated. And there is a  
9 question in my mind, at least at this point, about the  
10 November 20, 1998 and what the David Brokaw letter  
11 might have said to more thoroughly examine this issue.

12 MR. LUTZKER: Then I would respectfully  
13 suggest this: The issue that you have to resolve is  
14 basically the death sentence with respect to this  
15 particular claimant. If there are ambiguities that go  
16 to questions that may arise, testimony can be  
17 addressed to that. I do not read the Copyright  
18 Office's order as precluding clarification of any of  
19 the documents that have been provided to you.  
20 However, where we have a document that is dated as of  
21 July 30, where we have a faxed document signed by an  
22 officer of the claimant dated July 30, the Copyright

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1 Office said, "Show me something that says this was  
2 executed prior to August 1 of 1998." That was the  
3 exact date.

4 This document shows that. MPAA is raising  
5 issues about it. They're entitled to, but they're not  
6 entitled to in the context of a motion to dismiss. We  
7 have met our burden with respect to the presumption  
8 that there is a lawful relationship between United  
9 Negro College Fund and IPG for purposes of the claim  
10 filed timely in 1998. And if there are other issues  
11 that wish to be addressed, they can be addressed  
12 during the course of examination -- course  
13 examination.

14 JUDGE COOLEY: Mr. Lutzker, it seems that  
15 you and Mr. Tucci disagree on whether or not testimony  
16 is admissible on this particular issue. And I want to  
17 clarify for the record, are you requesting permission  
18 to introduce testimony on this issue or what?

19 MR. LUTZKER: In terms of -- I mean, we  
20 have made our case, which is essentially that IPG  
21 represents a group of 14 entities. Our direct case  
22 will be presented. There will be, as opposing counsel

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1 has the right, cross examination, and they can raise  
2 issues based upon the discovery documents. These are  
3 a sense, at this point, discovery documents, and they  
4 have a right to cross examine and ask questions, and  
5 we have a right in redirect to address open issues.

6 JUDGE COOLEY: Well, I guess the question  
7 I have is we're going to have to make a decision on  
8 these particular claimants that have been brought into  
9 issue here. And the question I have is even before we  
10 get to the hearing on the merits, we still have to get  
11 through the threshold issue of who is a claimant whom  
12 you are representing. And the question I have is  
13 maybe the answer is simple. Maybe you're not asking  
14 to introduce any testimony on these issues.

15 MR. LUTZKER: Our position is this: that  
16 the documents satisfy the Copyright Office's  
17 requirements by providing clearly and unambiguously,  
18 in the case of the United Negro College Fund, a signed  
19 agreement in addition to the other agreement, a signed  
20 document dated July 30. That, in our view, satisfies  
21 the concern of the Copyright Office. There is always  
22 issues when you're dealing with documents as to the

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1 authenticity of the document, the timeliness, and it  
2 could be raised with respect to anyone. But in terms  
3 of on its face has this document satisfied the  
4 obligations, we believe it has. Nevertheless, the  
5 motion to dismiss has been renewed, it has been  
6 presented.

7 Our position is that you cannot, in light  
8 of this document, say that we have not clearly and  
9 unambiguously met the obligations that the Copyright  
10 Office has imposed on us, because remember, I mean the  
11 Copyright Office receives 600, 700, 800 claims filed  
12 in a given year. The scrutiny that's attached to the  
13 claims occurs not at when they're received. There is  
14 some ministerial analysis that is made, but if they  
15 are facially accepted, it then goes to the proceeding.  
16 And then it goes to -- if there is a contested  
17 proceeding, it would go to testimony of both sides  
18 with respect to those documents.

19 There's no evidence that MPAA has  
20 introduced that says this document was not signed on  
21 July 30. They can question it, but they haven't  
22 introduced any contrary evidence with respect to any

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1 one of these. They've added their interpretation,  
2 their analysis. That's their right to do so. But our  
3 obligation was to provide written material to you that  
4 shows that that relationship fundamental to filing the  
5 claim existed in a timely manner so that the integrity  
6 of the July 31st date would not be impugned. And we  
7 feel we've done that.

8 JUDGE COOLEY: Okay. I believe that Mr.  
9 Tucci alleged anyway that there be other documents in  
10 your files that relate to these particular  
11 representation agreements. We see reference to a  
12 Brokaw letter, if nothing else. Are there other  
13 documents that are in the file -- one of these files?

14 MR. LUTZKER: There could be. Let me put  
15 in the context the procedure by which these documents  
16 were assembled, and it involved -- we may get to this  
17 at a later point today or perhaps tomorrow -- these  
18 telephone conversations. The Copyright Office -- we  
19 sought clarification of the Copyright Office's ruling,  
20 because we, as I said earlier, believe that oral  
21 agreements have a binding relationship to parties,  
22 that you can agree orally and that can then bind you,

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1 that can constitute a contract, and you can enter into  
2 a written documentation later. In some cases you  
3 never enter into written documentation.

4 The Copyright Office, as I said, to  
5 preserve the integrity, wanted to see something in  
6 writing. They said, "You've got to file a claim.  
7 That's got to be in writing. If we're going to give  
8 you an exception, we're going to impose this burden.  
9 You've got to show us something in writing."

10 It then comes to the question about -- now  
11 I've lost my train of thought.

12 JUDGE COOLEY: There are other documents.

13 MR. LUTZKER: The other documents. The  
14 Copyright Office -- we sought reconsideration. The  
15 Copyright Office spelled out its details. The  
16 documentation the Copyright Office initially wanted to  
17 be produced in, if I recall, and Greg may have a  
18 recollection as well, I believe it was within two  
19 days. And under the circumstances of timing we asked  
20 for an additional period, and they said the 10th. I  
21 think the end result amounted to an extra week of  
22 assembling documentation.

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1 I called my client, I said, "Here's the  
2 deal. Pull together what you can." He went through  
3 his files. He has files that were shipped in boxes  
4 from California. There may be things in storage. He  
5 pulled together everything that he had, and from our  
6 point of view we're stuck with this, in a sense.  
7 We're stuck with we can have no more documentation  
8 proving our case than what is here.

9 I was not aware of any additional  
10 documentation. I don't know whether he's aware.  
11 Obviously, if there's a reference to a letter, a  
12 letter may exist, but it may not exist, okay? In  
13 terms of what was discerned in the files, we provided  
14 the material that was there. If additional discovery  
15 is deemed appropriate and if additional research is  
16 requested, the party's obligation is to go back check  
17 again and see if there's anything else. I mean at the  
18 moment, I'm not aware of anything else, but as I said,  
19 we're limited, in terms of advancing our case, to the  
20 documents that we've presented.

21 Well, they started saying -- pleading  
22 speak a lot to this, though. I will, unless you have

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1 other specific questions --

2 JUDGE CAMPBELL: Mr. Lutzker, are you  
3 finished for the moment?

4 MR. LUTZKER: Yes.

5 JUDGE CAMPBELL: Thank you. Mr. Tucci,  
6 feel free.

7 MR. TUCCI: Thank you. I will be brief,  
8 although I've said that before.

9 A couple of points specifically address to  
10 some of the arguments Mr. Lutzker made. Mr. Lutzker  
11 asserted that the program suppliers have not come  
12 forward with any proof that, for example, United Negro  
13 College Fund letter agreement was not executed prior  
14 to August 1, 1998. Again, that's not our burden. It  
15 is their burden to demonstrate compliance with the  
16 criteria of the Copyright Office that it was executed  
17 prior to August 1998. The burden is not on us. The  
18 burden is on IPG.

19 One of the other points that Mr. Lutzker  
20 made was that MPAA had received the benefit of an  
21 exception from the Copyright Office. That is in fact  
22 not true. Let me read exactly what the Copyright

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1 Office. It said, and this was in the context of  
2 probably our next motion regarding the representation  
3 agreements that the program suppliers had --

4 JUDGE CAMPBELL: Was that in an order,  
5 sir?

6 MR. TUCCI: Yes, it is.

7 JUDGE CAMPBELL: Could you identify the  
8 order?

9 MR. TUCCI: The order is the June 22nd  
10 order.

11 JUDGE CAMPBELL: Thank you.

12 MR. TUCCI: It's in a different portion  
13 dealing with something other than the motion to  
14 dismiss. What the Copyright Office said, it said,  
15 "IPG submits that Lacey Entertainment and General  
16 Mills' failure to file a timely Notice of Intent to  
17 Participate has the same effect as failing to timely  
18 file a claim." We disagree. Timely submission of a  
19 claim is a statutory requirement. We lack the  
20 authority to waive the requirement. A timely Notice  
21 of Intent to Participate is a regulatory requirement,  
22 and it is well established practice that a party

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1 wishing to file an untimely notice may move for leave  
2 to do so.

3 So, what the Copyright Office was doing  
4 there was interpreting its regulations and allowing  
5 program suppliers to comply with those regulations  
6 through a motion. It stated explicitly on the record  
7 that the statutory requirement that it had found in  
8 exception on behalf of IPG for, it had no authority to  
9 do. This is basically the way I started the argument  
10 an hour and a half ago.

11 So, they're not the same situations.  
12 We're dealing with the regulations or we're dealing  
13 with the statute. They're not the same. And the  
14 Copyright Office's authority with respect to each is  
15 vastly different. It's not the same situation.

16 Mr. Lutzker also made the point that what  
17 you do here with respect to these claimants may shape  
18 future proceedings. That's absolutely not true. What  
19 the Copyright Office ordered regarding the IPG special  
20 exception, in the same order it stated that it would  
21 not hesitate to dismiss untimely joint claims in the  
22 future. It specifically said this is a one-time IPG

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1 exception. It is not -- this is not regulatory  
2 practice going forward.

3 And I might add that the Copyright Office  
4 has never hesitated to find untimely and dismiss late  
5 filed claims. One program supplier a couple of years  
6 ago sent their claim form to the Copyright Office via  
7 Federal Express. Well, it's a post office box.  
8 Federal Express does not deliver to a post office box.  
9 But for that, it would have gotten here within the  
10 statutory time frame. The Copyright Office dismissed  
11 that claimant. It has no hesitation to dismiss a  
12 claimant except for some reason in this instance.

13 Now, this is a pretty cut and dry -- well,  
14 before I move on to that, let me make one other point  
15 with respect to the Copyright Office's dealings with  
16 this particular claim. I am not certain whether this  
17 document is attached to a pleading. I think that it  
18 is, but in the event that it's not, it is part of the  
19 official record to the Copyright Office. This is a  
20 letter to Mr. Galaz dated July 23, 1998, which is from  
21 the Copyright Office, which references a prior  
22 telephone conversation with a member of his office and

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1 member of the staff of the Copyright Office, and it's  
2 detailing deficiencies in the claim submitted by  
3 Artist Collection Group, Limited. And it checks two  
4 boxes. The first box is the telephone number,  
5 facsimile that needs to be properly put on the claim.  
6 But most importantly, on the second page, the first  
7 box at the top of the page, it says "For joint claims.  
8 A concise statement of authorization for filing of a  
9 joint claim. And" -- underlined -- "the name of each  
10 claimant to the joint claim." They were told how to  
11 do it. They didn't do it correctly. The Copyright  
12 Office has given them a special exception. They can't  
13 comply with the special exception. Their claim must  
14 be dismissed.

15 The balance of Mr. Lutzker's argument is  
16 basically an argument that this panel should create an  
17 exception to the special exception, and that is not  
18 warranted. This panel should enforce the statutory  
19 requirements for a valid joint claim, and if it agrees  
20 that an exception exists, it should strictly enforce  
21 the exception in this case. And as we've  
22 demonstrated, they can't comply -- IPG cannot comply

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1 with the exception created by the Copyright Office,  
2 and this claim has to be dismissed.

3 MR. LUTZKER: May I have an opportunity  
4 just to make two brief comments since the material's  
5 been submitted.

6 JUDGE CAMPBELL: I think that is  
7 appropriate. I think that's quite appropriate.

8 MR. LUTZKER: Again, I think the issue,  
9 and I tried to explain earlier, is we're not dealing  
10 with a statutory failing here. The claim was filed  
11 prior to July 31, acknowledged by the Copyright Office  
12 and the like. What we're dealing with is a  
13 misunderstanding of Copyright Office regulations,  
14 which the Copyright Office has authority to waive.

15 In this case, a letter was sent saying  
16 joint claims only have to have the name of each  
17 claimant. This was understood by Worldwide Subsidy  
18 Group, and if the record were complete, you would have  
19 the original claim, which was filed in the name of  
20 Artist Collection Group as a joint claim. The error  
21 that was made at that point was the concept that you  
22 had Artist Collection Group and Worldwide Subsidy

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1 Group.

2 The amendment that was made in response to  
3 this letter was to add Worldwide Subsidy Group as a  
4 claimant so that you had Artist Collection Group and  
5 Worldwide Subsidy Group. The clear understanding or  
6 the clear misunderstanding by the claimant at that  
7 point in time was that the filing of a joint claim  
8 identifying Artist Collection Group and Worldwide  
9 Subsidy Group was the requirement.

10 The agreements with all the parties  
11 involved, as is discussed in sort of the earlier  
12 paperwork, go to the issue of each of these parties  
13 creating an authority, a transfer of the right to  
14 collect royalties to the Artist Collection Group. The  
15 understanding, and I'll call it the misunderstanding  
16 perhaps, under an interpretation of copyright law, is  
17 does that qualify you as a party to file a claim? I  
18 think it is reasonable to conclude it does qualify you  
19 as a party. The Copyright Office had problems under  
20 its regulation that you had to list all these other  
21 parties, all these other entities who were actually  
22 program owners. And, so the mere fact of the transfer

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1 of the right to collect a royalty didn't elevate you  
2 at that point in time to the status of a claimant  
3 under the Copyright Office's interpretation.

4 But the bottom line is that a timely claim  
5 was filed. It didn't comply with, under the Copyright  
6 Office's interpretation, how a joint claim under its  
7 rules should be submitted. The Copyright Office  
8 waived its rules. Whether it's extraordinary or  
9 whether it will ever be repeated again, I think all  
10 precedent stands as precedent, and if someone ever  
11 wants to cite it again, they may, and a future panel  
12 may agree with it or not and the Copyright Office may  
13 agree with it or not. I tend to think that for a  
14 period of time it may have more vitality than my good  
15 colleague, but that doesn't go to the issue of our  
16 dispute.

17 The issue of our dispute is have we  
18 provided the documentation to establish that there was  
19 a relationship existing with these claimants, because  
20 we didn't attach to our claim a sheet that says these  
21 are the 14 companies we're representing by July 31.  
22 And that was our error. It was not malevolent or

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1 intentional. It was done in good faith with an  
2 understanding, and it was wrong, according to the  
3 Copyright Office's interpretation. We've submitted  
4 more than enough documentation to establish  
5 relationships that existed in writing between  
6 claimants and the Worldwide Subsidy Group. And we  
7 feel that in terms of the motion to dismiss and if  
8 there are issues that they feel appropriate or  
9 inappropriate to continue in the course of this  
10 proceeding, then in our view testimony would be  
11 appropriate on that.

12 JUDGE CAMPBELL: Are there any more  
13 discussions on these points? Mr. Tucci, you're  
14 finished?

15 MR. TUCCI: I think I'll rest. Thank you.

16 JUDGE CAMPBELL: Mr. Lutzker, are you  
17 finished?

18 MR. LUTZKER: I'm done.

19 JUDGE CAMPBELL: All right. Why don't we  
20 take a five minute break so you can prepare your file  
21 of materials for argument.

22 (Whereupon, the foregoing matter went off

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1 the record at 5:07 p.m. and went back on  
2 the record at 5:10 p.m.)

3 JUDGE CAMPBELL: Move on to number 20,  
4 Independent Producer Group motion to dismiss claims  
5 and related materials available and ready.

6 MR. LUTZKER: Ready.

7 JUDGE CAMPBELL: And we're speaking --  
8 since we've had so many documents, we are speaking to  
9 this motion that was received by the Copyright Office  
10 on November 20, 2000.

11 Mr. Lutzker, you filed it. You may begin.

12 MR. LUTZKER: Thank you. Again, as I sort  
13 of acknowledged before, the documents in all these  
14 motions are sort of extensively briefed. So, I will  
15 try to just hit what are really the high points of our  
16 concerns.

17 The Copyright Office had the opportunity  
18 in its June decisions to address questions regarding  
19 the status of parties in this proceeding. And it made  
20 sort of one comment during the course of its ruling  
21 that who represents whom when is an important issue in  
22 this case. It often is not a question brought up

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1 before the Copyright Office or the panel, but this is  
2 an issue, and clearly we've spent the last hour and a  
3 half sort of focusing on when did agreements get  
4 signed with respect to IPG, and in fairness we are not  
5 alone in the world in having some issues with respect  
6 to the status of claims.

7 Now, as you know, the MPAA is not a  
8 claimant at all in this proceeding. It represents  
9 claimants. Parties have to file their claims, then  
10 they have to agree to be represented by the MPAA, and  
11 MPAA has to present their case. And that's the  
12 essence of the way they do things. With respect to  
13 this proceeding, there was a peculiarity that  
14 occurred. The claimants filed their claims. The  
15 Copyright Office -- they filed their claims in July of  
16 '98. The Copyright Office announces in the summer of  
17 '99, a year or so later, that a Notice of Intent to  
18 Participate in a proceeding involving the 1997  
19 royalties must be filed by a certain date, and the  
20 MPAA has been, as its experience, goes ahead and files  
21 that Notice of Intent to Participate.

22 It then turns out that they filed their

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1 direct case in this proceeding on April 3. During the  
2 course of the proceeding, their direct case, they  
3 indicated they represent 113 claimants and that they  
4 had executed agreements with 113 claimants. Now, as  
5 is our right in the course of discovery, we seek  
6 copies of agreements. Many of them, in fact, as a  
7 general matter, there was a resistance to provide us  
8 signed representation agreements, but eventually we  
9 got all the agreements that were entitled to. We  
10 didn't get them early; we got them late. It doesn't  
11 matter. We got them.

12 In looking at those agreements, we had the  
13 opportunity to reflect on another situation that  
14 developed. The situation that developed was that two  
15 agreements that we had asked for -- and really only  
16 two agreements were provided early on in discovery.  
17 Those are the agreements of Lacey and General Mills.  
18 Those agreements were provided very specifically in  
19 response to specific potential disputes as to  
20 ownership of programming. And we asked for them, and  
21 low and behold they provided us copies of the signed  
22 agreements. Those were the only agreements that we

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1 were provided with signatures. We received an  
2 agreement in blank and that was it.

3 Now, looking at those two agreements, one  
4 things was peculiar. The peculiarity was that the  
5 Notice of Intent to Participate in this proceeding had  
6 to be filed, under the Copyright Office's rules, last  
7 fall. And the agreements, these two agreements were  
8 executed after the filing of the Notice of Intent to  
9 Participate was made. It struck us -- and the Notice  
10 of Intent to Participate, as set out by the Copyright  
11 Office regulations or Federal Register Notice and  
12 consistent with regulations, is that all claimants  
13 come forward. You file your Notice of Intent to  
14 Participate. If you don't file your Notice of Intent  
15 to Participate, you're out. You've either -- even  
16 though you filed a claim, your claim doesn't  
17 necessarily have to be heard if you're not timely in  
18 connection with this.

19 Seeing that these agreements were executed  
20 after this filing date, we began a process of raising  
21 before the Copyright Office a decision as to whether  
22 or not MPAA represented these two entities, and these

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1 are the only two that we knew about at that point in  
2 time, in a timely manner. And we said -- I mean, your  
3 order said file or else you're out. They didn't even  
4 represent them by signed agreements. Should they  
5 remain a party?

6 The Copyright Office, in its order issued  
7 on June 22, said this is a deviation from our rules,  
8 and what we're going to do is we're going to allow the  
9 claimants represented by MPAA to come forth and make  
10 their case for a waiver. We've done this in the past,  
11 and there are reasons that they felt supported that.  
12 MPAA filed a petition for -- filed a motion for late  
13 acceptance -- motion for acceptance of a late file  
14 Notice to Participate. And that was done on June 30.

15 In that document, MPAA dropped a footnote,  
16 footnote number one on page 1. It said, "We have  
17 looked through our agreements and low and behold one  
18 of the 113 claimants that we represent, Gaumont SA, we  
19 don't have an agreement for." And they say, "We had  
20 a standard that we would have agreements executed as  
21 a matter of our internal policy" -- I don't know if  
22 this is exactly correct, but essentially the point

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1 they were making is, "Before we file our direct case,  
2 we'll have agreements with everybody. And Gaumont we  
3 don't have an agreement with, so we are relinquishing  
4 Gaumont's case," and they dropped a footnote to that  
5 effect. Okay.

6 And then they filed -- they didn't file  
7 sort of independent claims describing contracts that  
8 were executed between individual companies and MPAA.  
9 They filed a blanket claim on behalf of everybody;  
10 they laid out their case, and they basically, reading  
11 that document, one would conclude Gaumont is the only  
12 one that had a problem.

13 Then over the course of the next two or  
14 three months, we're doing our litigating thing, and we  
15 eventually receive copies of the signed executed  
16 agreements. And we had been entitled under  
17 compulsion order of the Copyright Office to receive  
18 all the documents.

19 In looking at the documents, a couple of  
20 things came to the fore, which were really addressed  
21 in this motion. First and foremost, Gaumont wasn't  
22 the only one that didn't have a signed agreement. It

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1       turned out of the material that we received, four  
2       companies did not receive -- did not deliver signed  
3       agreements -- or MPAA didn't deliver signed  
4       agreements. And we said what's good for Gaumont is  
5       good for the others. If you don't represent them --  
6       if you don't represent Gaumont, you have no basis to  
7       represent these companies.

8               Subsequent to the filing of this motion,  
9       we were delivered last week -- I think it was last  
10      week; November 28, whenever that is -- the executed  
11      agreements with Jeopardy and American First run. And  
12      we accepted -- you know, there's a lot of paper that  
13      gets transferred back and forth, and mistakes happen.  
14      They had it. So, as far as those two companies are  
15      concerned we withdraw our concern, because they have  
16      the documents.

17             Okay. Atlantis Communications and Big  
18      Ticket, however, we don't have any documents for.  
19      Now, the opposition to our motion comes up with a  
20      series of explanations for this. And my reaction to  
21      the documentation as presented in our reply is as  
22      follows: As far as Big Ticket and Atlantis is

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1 concerned, there are not representation agreements,  
2 and there's no basis upon which they can say that  
3 those entities as such are represented in this  
4 proceeding. Like Gaumont, their claims must be  
5 dismissed.

6 It may turn out, and I would presume under  
7 the circumstances that they will offer in testimony,  
8 that if it is true -- and there's no evidence to this  
9 argumentation; there's no documentation on this point  
10 -- if it is true that there has been a transfer of  
11 ownership and the line of ownership remains  
12 legitimate, a third party may succeed to those  
13 particular interests. And it may be that a claim can  
14 be amended or clarified by later testimony with that  
15 respect to that. But fundamentally Big Ticket and  
16 Atlantis Communications have no independent basis in  
17 this case.

18 And as you can see, we can get into the  
19 nuances and particularities of how people are  
20 represented, the nature of claims, the ownership  
21 interests that are transferred. And we're not in a  
22 position to say they are they are not. Those rights

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1 are not held by somebody else. A claim was filed. If  
2 the party was sold and the business was created, I  
3 mean, we have sort of illusions to this in the papers,  
4 but that's not a basis to say this party has signed an  
5 agreement and is entitled to be a claimant.

6 The waiver request that was filed in June,  
7 and there was a reply to that waiver request, never  
8 alluded to anybody not signing an agreement. There  
9 was -- the direct case indicates that there --  
10 everybody executed agreements for representation  
11 purposes. The attachment to the -- the amended  
12 attachment, which eliminates Gaumont in the waiver  
13 request, does not eliminate any other party.

14 In our view, it's a pretty straightforward  
15 case. They may or may not have a basis to come back  
16 with respect to particular programs, but as far as the  
17 claimants are concerned, these are entities that are  
18 not represented by MPAA, and they can't be -- they are  
19 not part of the MPAA case. And we ask you to so find.

20 Then with respect to the remaining  
21 documents that we've had an opportunity to visit with  
22 after they were sort of compelled and provided in

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1 discovery, there were certain other anomalies that  
2 were presented. And the next section of our original  
3 motion sort of addresses the anomalies, and I will  
4 acknowledge that some of these anomalies may be  
5 addressable by fax that can be presented, but there  
6 are certain core questions that go to the legal  
7 sufficiency of the documents themselves that may  
8 require -- in our view requires a ruling by the panel.

9 When the Copyright Office issued its  
10 ruling with respect to the documentation that was to  
11 be provided by MPAA in connection with this, as I  
12 said, on June 28, the Copyright Office's order --  
13 ruling on our request for certain documentation with  
14 respect to these claimants says specifically, "Who  
15 represents the copyright owners entitled to  
16 distributions of the '97 syndicated program royalties  
17 and when they were represented is very much in issue  
18 in this proceeding." That's the Copyright Office's  
19 concern. They acknowledge that the program suppliers  
20 assert that the 113 parties are identified, that they  
21 represent them, and this is a factual assertion.

22 Consequently, the program suppliers must

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1 produce, this is our compulsion order, the signed and  
2 dated copies of the representation agreements between  
3 program suppliers and each of the Exhibit 1 parties.  
4 Now, our issues in the second part go to has the MPAA  
5 produced signed and dated representation agreements  
6 with each of the 113 parties?

7 With respect to several of these parties,  
8 we see critical problems. In one case, with respect  
9 to -- in actually two cases, Cinetel and Major League  
10 Baseball Properties, the signatures of the represented  
11 claimants are undated. Now, the form itself requires  
12 a dating, but the signatures themselves are undated.  
13 In our view, this raises an issue as to the timeliness  
14 of that signature.

15 Now, this was -- the critical thing from  
16 our perspective is not that they're undated. The  
17 critical thing is when the waiver request was made in  
18 June of this year and the MPAA had all these documents  
19 in its sole possession and IPG was asking for access  
20 to these documents and it was being denied access at  
21 that point in time, the MPAA, when it had the sole  
22 possession of the documents, failed to disclose

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1 material issues or issues that could be material to  
2 the Copyright Office in making its judgment on the  
3 waiver.

4 As a result of that, the Copyright Office  
5 never had the opportunity to clarify do we mean signed  
6 and dated by one party or the other? IPG did not have  
7 the opportunity to argue that issue, and as a result  
8 the issue has enough ambiguity that we think goes to  
9 the heart of were these representation agreements  
10 signed and when were they signed? And there's an open  
11 issue with respect to Cinetel and with respect to  
12 Major League Baseball Properties.

13 JUDGE COOLEY: On that issue --

14 MR. LUTZKER: Sure.

15 JUDGE COOLEY: -- should there be a  
16 difference in our mind, as arbitrators, as to the  
17 requirements that are placed on you with regard to  
18 your representation agreements vis-a-vis the  
19 representation agreements that are on this side of the  
20 room?

21 MR. LUTZKER: Here's where I would draw  
22 the distinction: Our burden -- we filed a timely

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1 claim, but we didn't have the joint statement. The  
2 Copyright Office, to validate that, wants to assure  
3 that the representation existed in July of '98 to  
4 satisfy its definition of a joint claim. We said we  
5 filed a joint claim, and we didn't include the  
6 paperwork that showed it. They wanted to verify that.

7 In this case, there is a regulation that  
8 requires entities to come forth and notice their  
9 intention to participate in a proceeding. It's  
10 critical, because if you don't come forth, your claim,  
11 even though you filed a timely claim, is gone.

12 So, there is a close analogy, I believe,  
13 between the nature of -- that's why the Copyright  
14 Office said, and they said it in the context of IPG's  
15 motion with regard to the timeliness of the signatures  
16 of Lacey and General Mills with respect to the MPAA  
17 contracts, when the agreements were reached is an  
18 issue that the Copyright Office felt was relevant with  
19 respect to theirs. And, so it obviously was relevant  
20 with respect to ours, because they wanted us to prove  
21 that we had the relationship existing by a certain  
22 date, and they had to prove that they had a

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1 relationship existing by a certain date.

2 What was that date? That date was, for  
3 purposes of their waiver, the filing of the direct  
4 case. If they had agreements -- that's why I say with  
5 respect to Jeopardy and American Studios, they  
6 presented documents that showed that they had the  
7 agreement prior to the filing of the direct case, and  
8 we withdraw our objection.

9 With respect to these parties, they don't  
10 prove that they've had that relationship existing at  
11 the time, because the claimant has not signed. If the  
12 claimant doesn't sign -- I take that back, the  
13 Claimant has signed but hasn't dated. So, the issue  
14 is not with regard to the signature but with regard to  
15 the dating. And the Copyright Office felt that the  
16 dating was a critical point with respect to these  
17 agreements. So, the issue is relevant to both.

18 In addition, as has been laid out numerous  
19 times in the course of the discovery request, there is  
20 no correspondence, there is no additional  
21 documentation, because we've asked for it. Give us  
22 correspondence with the claimants. Give us, you know,

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1 cover letters or -- we have no documentation to  
2 support and they have no documentation to support the  
3 date of signing. So, we're left with an undated -- a  
4 document that's signed but undated.

5 In connection with the next three -- the  
6 Alliance International, All American Goodson, and All  
7 American Television -- we have another anomaly. The  
8 anomaly here is the documents are dated by MPAA after  
9 the date of the filing of the direct case. To us  
10 that's a -- it's an anomaly, and it raises a number of  
11 questions. There's again no documentation to clarify  
12 the anomaly. Clearly, the documents on their face are  
13 dated prior to the filing of the direct case.  
14 However, were they received by the MPAA prior to the  
15 direct case, because they are -- they could have been  
16 signed in February. They could have been put aside by  
17 somebody.

18 It's not necessarily clear from the  
19 document why it would be signed after the filing of  
20 the direct case. But importantly, the direct case  
21 says we have executed agreements with everybody, and  
22 they sign -- every agreement, every other agreement

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1 that they claim is valid is signed by both parties and  
2 dated by both parties. So, where you have an anomaly  
3 like this it does raise a legitimate concern that  
4 there may be an issue as to the actual receipt dating  
5 in relation to the filing of the direct case.

6 There are three additional agreements that  
7 we've also identified, and again the additional  
8 anomalies, in one case it is unsigned by the MPAA,  
9 signed by a claimant but unsigned by the MPAA. Does  
10 that meet the Copyright Office's requirement of June  
11 28? In another case, it is signed and dated by the  
12 claimant but merely signed and not dated by the MPAA.  
13 And in the third case, and I will admit I'm working  
14 off of presumably a xerox copy, but my looking at the  
15 copy leads me to believe the date is sometime a year  
16 too early, which raises a question. I mean, there may  
17 be a mistake. If it can be clarified, so be it. But  
18 there clearly seems a disjointer, because it appears  
19 to be dated a year before it was sent, which I don't  
20 have to explain, but I think I just point that out as  
21 an anomaly.

22 The third set of issues --

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1 JUDGE CAMPBELL: I have a quick question.

2 MR. LUTZKER: Sure.

3 JUDGE CAMPBELL: How would you know when  
4 it was sent?

5 MR. LUTZKER: In the discovery material,  
6 we obtained documents that place -- and I'm going on  
7 memory now -- I believe it's October 20, 19 or 20, of  
8 1998, and there's a memorandum from Ms. Kessler to  
9 claimants indicating the -- here's our representation  
10 agreement, and so that was the date that I was using  
11 on that basis.

12 JUDGE DAVIS: Excuse me --

13 MR. LUTZKER: I'm sorry, it was October of  
14 '99. October 20, 1999 was the date that the  
15 memorandum was sent out. The CPT document appears to  
16 be dated in '98.

17 JUDGE DAVIS: I just wanted to get that  
18 straight, that CPT in that was Exhibit Number 9.

19 MR. LUTZKER: Right.

20 JUDGE DAVIS: Okay. Thank you.

21 MR. LUTZKER: Okay. Now, the -- and  
22 again, I'm just reading what I'm reading. The last

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1 two issues -- or the last actually it's three entities  
2 for which we raise an issue goes to this very question  
3 of joint claims. And we feel in the sense that a  
4 spotlight has been turned on IPG for its involvement  
5 with WSG's claim. It is not inappropriate for the  
6 panel to look at other parties that filed in terms of  
7 a joint claim or in terms of representations that they  
8 make a joint claim and whether or not they meet the  
9 Copyright Office requirements. And it may be that the  
10 panel will decide that what's appropriate for IPG is  
11 also appropriate for these entities based upon the  
12 order. That's why I said they may have other  
13 applicability.

14 But because the issue had not been  
15 addressed before, and I just again raise the point  
16 that the claims of overview productions and also two  
17 separate claims, one by PGA Tours and then also by  
18 PGA, speak in terms of joint entities that they are  
19 representing. There's a letter attached to the  
20 overview which suggests that they are speaking as a  
21 joint claimant, as a copyright owner, and as a  
22 licensed distributor. They have not clarified in that

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1 letter whether or not the nature of their licensing is  
2 exclusive or non-exclusive. They don't identify any  
3 other parties. And, so it does raise, in our view,  
4 ambiguities that have been addressed at us, and we  
5 think, again, it is not inappropriate -- if you're  
6 going to take scrutiny at what we do and we've  
7 presented additional documentation, this has some of  
8 the same flavor.

9 The issue with regard to the PGA speaks in  
10 terms of filing on behalf of itself and all of its  
11 membership. In the opposition it was stated, "Well,  
12 this doesn't require entities to file names of  
13 members. This is not a joint claim." However, if you  
14 look at, as we did in our reply, and make specific  
15 reference to a number of other claims filed and  
16 represented by the MPAA, there are many people that do  
17 speak of a joint claim on behalf of membership and  
18 attach of list on behalf of their members of all their  
19 listed members. And included in that are the National  
20 Basketball Association, the Audio-Visual Copyright  
21 Society, the Canadian Broadcasting Corporation, and  
22 NHL Enterprises. In each case they say we're filing

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1 on our behalf and the behalf of its members. Attached  
2 is a list of the members.

3 JUDGE CAMPBELL: But, Mr. Lutzker, doesn't  
4 a non-profit organization always speak on behalf of  
5 its members? They don't have stockholders. And it  
6 would seem that they are the ones who would receive  
7 the royalties. And my understanding is PGA Tour, Inc.  
8 is a not for profit. So, do you have a response to  
9 that? I just need to know where you're going with  
10 this.

11 MR. LUTZKER: Well, my interpretation of  
12 on behalf of its members are that it is not a stock  
13 corporation, but when it speaks of members it does  
14 speak of third parties. It is identified -- it could  
15 have said, "We're filing on our behalf," in which case  
16 I don't think the issue would have necessarily been  
17 addressed. They chose to style this filing on behalf  
18 of our members. It's because a non-profit is not a  
19 stock corporation it has a listing of entities that  
20 are entitled to share in these proceeds.

21 JUDGE CAMPBELL: Well, perhaps --

22 MR. LUTZKER: Okay.

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1 JUDGE CAMPBELL: -- depending on what the  
2 membership --

3 MR. LUTZKER: Yes. Depending -- yes, I  
4 mean --

5 JUDGE CAMPBELL: So, maybe we can get some  
6 clarification.

7 MR. LUTZKER: The nature of the membership  
8 is not clear on its face. And in terms of the  
9 analogies, as I said, when others have used the  
10 phrase, they have listed this -- and I suspect this  
11 Copyright Society, there may be others. I don't know  
12 if the Canadian Broadcasting Corporation -- I don't  
13 know whether its legal status is that of a -- I mean,  
14 there's a governmental component to it, whether it's  
15 -- it may not be viewed as a for-profit corporation.  
16 I don't know.

17 JUDGE CAMPBELL: Well, let's take a look  
18 at your Exhibit 10 we were talking about, the overview  
19 productions, because there are two items there.  
20 You've been kind to put them both in. The July 22,  
21 1998 letter indicates that overview -- that the claim  
22 affidavits were submitted in joint capacity to cover

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1 properties where overview is not the sole copyright  
2 owner. And since we're dealing with United States  
3 copyright law, a co-owner is like a partner and is  
4 allowed to receive royalties and exploit the copyright  
5 without even talking to the other co-owner as long as  
6 the royalties are paid. So, do you still feel that  
7 that is a joint claim, because I'm afraid that a lot  
8 of our owners, if you looked at the different  
9 copyright owners, would probably be joint owners. And  
10 that seems to me splitting hairs, but I want to hear  
11 what you have to say.

12 MR. LUTZKER: Well, I think the issue is  
13 -- what they say here is they may be -- where they're  
14 not the sole copyright owner but rather maybe either  
15 only a co-owner, in which case I would agree, a co-  
16 owner would be an owner, or a licensed distributor  
17 that is authorized to file here. That's the phrase  
18 that gives me some concern. An exclusive licensee for  
19 purposes of filing a claim without a status, in our  
20 view, is a claimant. A non-exclusive licensee may  
21 not. I don't know if this issue has been presented  
22 before to the Copyright Office or to the CARP. I know

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1 that there are -- I mean, if you look at under the  
2 Copyright Act under section -- under the remedies  
3 provisions, a non-exclusive licensee is limited in  
4 terms of the remedies. Or put it like this: The  
5 remedies that are available are available to an owner  
6 or an exclusive licensee of copyrighted property.  
7 They are not available to a non-exclusive licensee.

8 The letter does not resolve that issue,  
9 and I don't know the nature of the third parties that  
10 they may be licensing and the nature of those  
11 relationships. If they are exclusive -- and again  
12 MPAA has no documentation that they can proffer at  
13 this point, because we've asked for all the documents,  
14 correspondence, and information that they have from  
15 the claimant.

16 Now, it does pose, to me, an issue of  
17 proper status of a claimant. And if they were simply  
18 applying -- and I think in the response is an issue  
19 whether or not this is an individual claim and a joint  
20 claim. I mean that may be without trying to split  
21 hairs, I would not find a problem. It would require  
22 perhaps a waiver, an amendment of copyright office

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1 regulations that I think since it hasn't been ruled on  
2 before you can probably resolve as to whether or not  
3 how you characterize this claim as an individual claim  
4 or as a joint claim. But if it's an individual claim,  
5 then they would have a burden of proof with respect to  
6 each of the programs that are assigned to them and  
7 what is their relationship.

8 Are they the owner or co-owner of those  
9 programs? Those are fine. If they are licensed from  
10 the third party, if they're an exclusive licensee,  
11 they would also be able to claim those. If they're  
12 non-exclusive licensee, that is the area where we have  
13 an issue. So, if they are a joint claimant, it is  
14 appropriate to list the parties where they have a non-  
15 exclusive relationship with, and then they would  
16 satisfy the requirements of the copyright laws.

17 JUDGE CAMPBELL: Unless, of course, a non-  
18 exclusive relationship included language that allowed  
19 that non-exclusive licensee to file.

20 MR. LUTZKER: Well, here's where -- that  
21 sounds a lot like the problem that we've got, that IPG  
22 has. All of IPG's agreements are arrangements with

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1 claimants that say, "IPG you have exclusive right to  
2 -- in this case exclusive right. You are going to  
3 collect that money." And then based on their  
4 agreement, they figure out how to divvy it up. But  
5 there is a transfer of rights of collecting the  
6 royalties. And IPG thought that was enough to qualify  
7 them to make a claim on behalf of the parties with  
8 whom they had the agreement. And the Copyright Office  
9 said no. I don't necessarily agree with it, but for  
10 present purposes that's the law, okay?

11 IPG's contracts that says, "IPG, you're  
12 the one to go after these royalties exclusively.  
13 We're not going to do it. We own the property. We're  
14 not going to do it. You're going to do it." That  
15 does not transfer the interest sufficient to satisfy  
16 the requirements, and what they had to do was mention  
17 the parties with whom they had the agreements.

18 And, so in this case, by saying we're a  
19 joint claimant, by saying they're a joint claimant  
20 because they own things, whether they own it outright  
21 or co-own it, they own it, and they're a claimant.  
22 Where they're licensed, they either have the right

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1 sufficient to be a party here as an exclusive licensee  
2 or they should identify the parties. That's our  
3 position.

4 JUDGE CAMPBELL: Thank you. Mr. Tucci?

5 MR. TUCCI: Thank you. We view this  
6 motion as a discussion of the reddest of red herrings.  
7 This is just a blatant effort to lump together the  
8 motion that we just spent the last three hours talking  
9 about and apply that criteria established in a  
10 copyright order to the representation agreements that  
11 exist with respect to the program suppliers. The  
12 problem with doing that is there's no statute that  
13 requires it, there's no regulation that requires it,  
14 and there's no order of the Copyright Office that  
15 requires it. As a matter of fact, the program  
16 suppliers could have oral representation agreements  
17 with each and every one of their represented parties.  
18 There is absolutely nothing that requires a written  
19 representation here. There is an order of the  
20 Copyright Office that requires us to produced written  
21 representation agreements if they exist, obviously,  
22 and that's what we've done. It's a matter of practice

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1 that the MPAA requires written agreements. It is not  
2 by regulation, it is not by statute, it is not by  
3 order. Everything that Mr. Lutzker just talked about  
4 is ripe for cross examination of the MPAA program  
5 supplier's representative, but that's all it is. It  
6 all goes to the weight that you want to give the  
7 evidence that will be before you.

8 We have asserted in the direct testimony  
9 that we represent these parties. We have asserted,  
10 and it's been accepted by the Copyright Office, that  
11 each and every one of them filed a valid claim. We  
12 have asserted a Notice of Intent to Participate in  
13 this on behalf of each and every one of those parties,  
14 and that has been accepted by the Copyright Office.  
15 There's a prima facie case right there. There is  
16 absolutely no reason that any of these relationships  
17 are subject to being dismissed at this time.

18 It's all a matter of proof. It's all a  
19 matter of whether or not Mr. Lutzker and his client  
20 can cast sufficient doubt on our factual assertion of  
21 representation; that's it. And the evidence before  
22 you will show things like we have represented a

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1 particular party for ten or 15 years. The evidence  
2 will also show that that party filed a claim. The  
3 evidence will show that that party is not claiming  
4 it's represented by any other party. I mean, it's  
5 going to be very difficult to cast aspersions and cast  
6 doubt on the factual assertion that the MPAA, the  
7 program suppliers represent these entities.

8 JUDGE COOLEY: You said each claimant has  
9 filed a claim, but is it a timely filed claim?

10 MR. TUCCI: Absolutely, absolutely. Every  
11 one has filed a timely claim. And as a matter of  
12 fact, even if we talk about the alleged joint claims,  
13 and I think some of the problems with the assertions  
14 of IPG were noted, those claims were not attacked on  
15 a timely basis by IPG. They're timely filed claims.  
16 There was a deadline imposed by the Copyright Office  
17 for attacking the validity of claims, and none of them  
18 were attacked. They're in this case.

19 And I think if you look at them in and of  
20 themselves, the actual facts of them speak volumes.  
21 The overview is not a joint claim by any stretch of  
22 the imagination. PGA, PGA Tour, I think we've hit on

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1 the inability to give you any reason to dismiss those  
2 claims on this basis.

3 But, again, this is only an issue of  
4 proof. It's an issue of whether we have made a  
5 factual assertion sufficient to make out a prima facie  
6 case and whether their argument defeats that  
7 assertion. And it doesn't, because as I stated, there  
8 is no requirement that we have a written agreement;  
9 there's no requirement we have a signed agreement;  
10 there's no requirement we have a dated agreement. We  
11 have made the factual assertion that we represent this  
12 client. If we have an agreement, you're right, we  
13 have to produce it, and we did.

14 JUDGE COOLEY: And, so then it's your  
15 position that you can introduce testimony in the  
16 hearing on these points if we raise them.

17 MR. TUCCI: Absolutely, absolutely. And  
18 if there's a question that needs to be clarified, it  
19 can be clarified at that point in time. Thank you.

20 JUDGE CAMPBELL: Mr. Lutzker, a response  
21 perhaps?

22 MR. LUTZKER: Yes. I mean just briefly.

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1 There was a requirement. The Copyright Office, in its  
2 Notice of Intent to Participate, told the world,  
3 "Claimants, if you want to participate come forth.  
4 Tell us on a certain date that you are in this  
5 proceeding." The notice further says if you don't --  
6 if you are a claimant and you don't file a Notice of  
7 Intent to Participate, you're out. Clear, okay?

8 Motion Picture Association files the  
9 claim. It is not a claimant. At the time it's filing  
10 a claim, it doesn't represent -- it doesn't have a  
11 signed agreement with anybody for 1997.

12 One of the earlier documents that we  
13 presented sort of broke out the litany of how many  
14 claimants are from year to year the same, and there  
15 are -- and I don't remember the number off the top of  
16 my head -- but there are dozens of new claimants in  
17 1997. Thirty-three percent approximately -- I think  
18 it was actually 37 or 38 percent of the claimants in  
19 1997 never participated in a prior proceeding. There  
20 is no basis for a presumption of long-standing  
21 relationships. There's no basis for a presumption  
22 that these entities will sign agreements with the

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1 MPAA.

2 Be that as it may, this is not an issue  
3 that normally has been litigated before, has been  
4 addressed, so okay. It gets raised. The Copyright  
5 Office says, "Oh, this is an issue." They didn't say,  
6 "We accept the MPA position on this." They said,  
7 "We're going to require the MPA to file a waiver  
8 request," which they did. They filed it on June 30.  
9 And in that waiver request -- I didn't write the  
10 waiver request; they wrote the waiver request -- they  
11 said, "We don't have a deal with Gaumont. We couldn't  
12 find it. We filed on April 3. They're out." They  
13 said it. I didn't say it. They said it. They must  
14 know something. They're intelligent, right? They're  
15 out.

16 Now, we've got two others that don't have  
17 an agreement, and they want to say they're in because  
18 we can have oral understandings. And the answer is  
19 they can't be in. You can't have it both ways. I'm  
20 not imposing these requirements. This is their own  
21 statement. They said, "We have written deals. We  
22 have agreements. We went through" -- read their

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1 motion for a waiver filed June 30 -- "We went through  
2 these and we're verifying, and here's an attachment of  
3 113 parties with whom we have agreements." And it  
4 turns out two days before, so they had time, and even  
5 if they had it in draft and they didn't have time to  
6 really think about it, they had the opportunity for  
7 reply later in July so they could have thought about  
8 this.

9 The Copyright Office in ruling on our  
10 motion to dismiss, or it might have been actually  
11 motion for compulsion of documents, said who  
12 represents them and when they represent them are  
13 important issues in this proceeding. So, to say that  
14 there are not rulings, the notice requirement sets it  
15 out clearly with respect to all the claimants.

16 And this isn't an issue that is  
17 necessarily one that could be addressed in testimony.  
18 I mean, we've already -- they've acknowledged  
19 repeatedly they don't have documents. Now, maybe  
20 witnesses can recall dates that things were received  
21 one by one by one. That may be the case, but they  
22 could have presented testimonial evidence by way of

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1 affidavit to explain defects. They didn't do  
2 anything. They left it for us to discover months  
3 after the fact, months after the fact because we  
4 didn't have access to discovery of these documents  
5 until, my recollection is, September 28. Months after  
6 the fact when we first get to review the documents, we  
7 finally have an opportunity to assess that.

8 So, I mean, from our point of view, the  
9 issues that are raised are cogent, legitimate, and to  
10 the extent there's some novelty with respect to them,  
11 I beg your pardon. But some of them seem pretty clear  
12 to me.

13 JUDGE CAMPBELL: There's a question here.

14 JUDGE DAVIS: With the danger of this  
15 turning into a roundtable on copyright, let me repeat  
16 your argument as I understand it, and feel free to  
17 stop me. The right to exploit the copyright and claim  
18 the royalties is a right exclusive to the copyright  
19 holder. Just like an assignment of the copyright  
20 itself, the assignment of an exclusive right must be  
21 in writing. Is that your argument?

22 MR. LUTZKER: The assignment of an

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1 exclusive right should be in writing, yes.

2 JUDGE DAVIS: And what you're saying for  
3 Atlantis and Big Ticket in particular is that there  
4 are no writings.

5 MR. LUTZKER: Correct.

6 JUDGE DAVIS: And some of these others  
7 arguments you say that even though there is a writing  
8 it is deficient because of dating and signing and  
9 things like that.

10 Now, Mr. Tucci, you get to talk about this  
11 too. Feel free.

12 MR. TUCCI: It's not an assignment of  
13 copyright. We are representing the interest of the  
14 copyright holder in front of this panel to collect and  
15 administer the royalty payment, and we turn around and  
16 cut a check back to the owner. That's it.

17 JUDGE DAVIS: I understand it's not an  
18 assignment of copyright --

19 MR. TUCCI: It's not an assignment, so --

20 JUDGE DAVIS: It's an assignment of an  
21 exclusive right held by a copyright holder.

22 MR. TUCCI: It's a statutory and

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1 regulatory manner in which to distribute copyright  
2 royalties administered by the Copyright Office.  
3 That's what it is.

4 JUDGE CAMPBELL: So, what --

5 MR. TUCCI: It's not an assignment to  
6 collect a copyright. I mean, we are participating in  
7 a regulatory and statutory scheme, which says that we  
8 can band together and represent interests of several  
9 holders. It does not say it has to be pursuant to  
10 writing. It doesn't say it has to be pursuant to a  
11 dated agreement.

12 JUDGE DAVIS: But it does have to be --

13 MR. TUCCI: And the practice in the past  
14 has been that none of this has been required. This is  
15 the first proceeding in which the Copyright Office has  
16 actually required the program suppliers to produced  
17 representation agreements. We have always in the past  
18 produced a blank representation agreement which  
19 sufficed as the form representation agreement, because  
20 quite frankly they're all the same. What happened  
21 this time is in this proceeding, based on the  
22 objection of IPG, and the reason you get the signed

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1 and dated language is because we had already produced  
2 this blank form. And, so the Copyright Office said,  
3 "No, this time we're going to make you do signed and  
4 dated ones, not just a blank form." So, I just want  
5 to make sure that that was cleared up and not an issue  
6 in your mind.

7 JUDGE DAVIS: Okay. Well, I'm sure we'll  
8 come again on this -- oh, feel free.

9 MR. LUTZKER: I mean, I think where I was  
10 coming from on your question related to the extent  
11 represented claimants are exclusive licensees --

12 JUDGE DAVIS: Yes?

13 MR. LUTZKER: There would be a writing  
14 with respect to that. I don't disagree with the  
15 principle that in other context there may be oral  
16 understandings between parties. I think we both have  
17 argued this at various points in our pleading, that  
18 you can have an oral representation agreement, and I  
19 would agree with that.

20 However, in this particular case, in this  
21 particular proceeding, the Copyright Office has made  
22 two independent rulings, one that applies to us and

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1 one that applies to MPAA. In our case they said, "We  
2 want to see written documents, because to preserve the  
3 integrity of the scheme, that people don't come in  
4 late and sort of lob on, climb on to a preexisting  
5 claim because you haven't sort of identified joint  
6 claimants. You've got to have some clarify, and so  
7 you've got to produce something in writing that's  
8 tangible that we can see rather than just oral  
9 testimony, and I talked to somebody on the phone, and  
10 they said it's okay."

11 In their case, in their case, because they  
12 failed to have executed agreements or even oral  
13 agreements. They don't allege oral agreements with  
14 parties prior to the filing of the Notice of Intent to  
15 Participate. When they filed their direct case, they  
16 say they have executed disagreements -- turns out they  
17 did and they didn't -- but at the time of filing of  
18 the Notice of Intent to Participate, they didn't have  
19 executed agreements with anybody. Therefore, in  
20 exercising its judgment, the Copyright Office says,  
21 "Okay, MPAA, come in for a waiver, but we're going to  
22 hold you to producing the signed and dated copies of

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1 these agreements by the MPAA program suppliers and the  
2 parties, signed and dated by both entities."

3 And, so our position is as regards these  
4 particular representation agreements, they should be  
5 signed and dated by both parties.

6 JUDGE DAVIS: I understand your position.

7 MR. TUCCI: May I very briefly address one  
8 point?

9 JUDGE CAMPBELL: Yes.

10 MR. TUCCI: It will be very brief. I just  
11 want to address the point of the two claimants that  
12 IPG would have you dismiss. They're both valid  
13 claims. They filed claims. And the other point that  
14 you need to be aware of is they were acquired by other  
15 claimants. So, the claim is still there. It's just  
16 being pursued -- it survives. It's being pursued by  
17 another MPAA program supplier party.

18 JUDGE DAVIS: And, excuse me, these are  
19 Atlantis and Big Ticket?

20 MR. TUCCI: Yes.

21 JUDGE CAMPBELL: And they were acquired by

22 --

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1 MR. TUCCI: Atlantis was combined with  
2 Alliance, and Alliance is a program supplier. Big  
3 Ticket was acquired by World Vision, which was  
4 acquired by Paramount. So, it actually has had a  
5 three-step process. And this has all occurred after  
6 the filing of claims and around the time of the filing  
7 of our testimony. So, we represent 113 parties here,  
8 and to place on us the burden of immediately filing  
9 something with the Copyright Office the moment one of  
10 our represented parties engages in a transaction or  
11 else the claim is dismissed is rather draconian.

12 JUDGE CAMPBELL: So, Atlantis is now part  
13 of Alliance --

14 MR. TUCCI: Alliance.

15 JUDGE CAMPBELL: -- which has already  
16 filed its claim.

17 MR. TUCCI: Right.

18 JUDGE CAMPBELL: And for the record, Big  
19 Ticket Television is part of what was World Vision,  
20 and that has been acquired by Paramount --

21 MR. TUCCI: Paramount, correct.

22 JUDGE CAMPBELL: -- also a claimant.

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1 MR. TUCCI: Correct.

2 JUDGE CAMPBELL: I have a question before  
3 you do.

4 JUDGE DAVIS: Go ahead, you're entitled.

5 JUDGE CAMPBELL: World Vision was a  
6 claimant.

7 MR. TUCCI: I think that's right as well,  
8 yes. So, actually, the numbers have gone --

9 JUDGE CAMPBELL: So, the numbers have gone  
10 down again, because that acquisition of sorts or  
11 whatever has drawn these into the same pot.

12 MR. TUCCI: Correct.

13 JUDGE CAMPBELL: Just trying to get  
14 clarification here.

15 MR. TUCCI: Correct.

16 JUDGE DAVIS: The same for Alliance too?

17 MR. TUCCI: Alliance is still a claimant,  
18 yes. They're in their own right.

19 JUDGE CAMPBELL: Today.

20 MR. TUCCI: Alliance is still a claimant  
21 today.

22 MS. KESSLER: Yes, they filed their own

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1 claim.

2 JUDGE DAVIS: Thank you. Excuse me, could  
3 you identify yourself for the record?

4 MS. KESSLER: I'm sorry, I'm Marcia  
5 Kessler, Vice President of Retransmission Royalty  
6 Distribution, MPAA.

7 JUDGE DAVIS: Thank you.

8 JUDGE CAMPBELL: Now, Mr. Lutzker.

9 MR. LUTZKER: All right. Two little  
10 things. I don't know what's happened with respect to  
11 the programs owned by Big Ticket and Atlantis. What  
12 we do know is there are no signed agreements. The  
13 waiver at the end of June said, "Here's the 113  
14 entities that we had signed agreements from." There's  
15 no correspondence between MPAA and any of these  
16 parties. I don't know when the agreements were -- if  
17 they were acquisitions, when they were acquired.

18 I have no trouble -- I'll say this for the  
19 record -- I'll have no trouble, if they want to  
20 present evidence at the hearing that Paramount or  
21 Viacom now represents these particular programs  
22 formally owned by somebody, that's -- and they can

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1 establish a chain of title, I have no problem with  
2 that. But that doesn't go to the issue of is Alliance  
3 or Big Ticket still a claimant represented by MPAA in  
4 this proceeding. That's the nub of the issue, because  
5 by failing to have any agreement with them, they can't  
6 be part of the group that executed representation  
7 agreements. They haven't. A successor company may  
8 have done that. Maybe the claimants assume, and  
9 that's something that we can explore.

10 And in the end, how much of a difference  
11 does it make? Well, it may make a difference, because  
12 sometimes companies sell programs in different  
13 directions. They may own ten. I don't know how many  
14 they own. Their claim only has to identify one. They  
15 may own ten, and they may sell eight to one entity and  
16 two to another. Is that other entity there. If we  
17 don't deal now with the propriety of Big Ticket, it  
18 opens up --

19 JUDGE CAMPBELL: Questions.

20 MR. LUTZKER: -- questions that frankly I  
21 don't think we should have to deal with, because it's  
22 their burden, it's their group. They said they had

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1       executed agreements, and they don't.

2               JUDGE CAMPBELL: Mr. Lutzker has made a  
3       recommendation that I feel is appropriate unless  
4       anybody else sees otherwise. Perhaps at the hearing  
5       tomorrow or in January if you could provide some  
6       clarification documentation. I don't think that's  
7       unreasonable. I think it will make it more clear for  
8       the Library at the end of these proceedings after the  
9       180 days. If you want to do it by oral testimony or  
10      by notarized affidavit, sworn affidavit, I think  
11      either one would be appropriate.

12             MR. TUCCI: We'll be happy to do that.

13             JUDGE CAMPBELL: Now, if there are no more  
14      questions or assertions by anyone? It matters because  
15      we don't want you to get assaulted by the police.  
16      After six o'clock they didn't want anybody without a  
17      pass to be in here. So, we will recess until tomorrow  
18      at the appointed time in the schedule, which is I  
19      believe --

20             JUDGE COOLEY: 9:30.

21             JUDGE CAMPBELL: 9:30? If that's  
22      satisfactory to everyone?

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1 JUDGE COOLEY: And could we clarify what  
2 motions are tomorrow? We know we have the third  
3 motion and there were other unidentified motions.

4 JUDGE CAMPBELL: Right. We have on the  
5 order recently filed about the schedule for these  
6 hearings, I think we finished number one and number  
7 two. We're on to number three. And then number four,  
8 outstanding motions, probably depending on how many we  
9 complete. We've just received several today.

10 MR. TUCCI: I think there's two that have  
11 been filed. There's Mr. Lutzker's motion to  
12 reconsider your November 15 order dismissing Lacey and  
13 General Mills. And there's our additional motion for  
14 -- motion for additional discovery.

15 JUDGE COOLEY: Right.

16 MR. TUCCI: And we're prepared to talk  
17 about -- actually, I think the motion for  
18 reconsideration of your November 15 order we've  
19 already probably hit every issue that's relevant.

20 JUDGE CAMPBELL: Do you feel that's  
21 appropriate? Okay. And there is a pleading cycle, so  
22 anyone who would be willing to do the oral argument

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1 without a pleading cycle can speak up. But if they  
2 want to go through a pleading cycle, that is available  
3 to you. We're not going to hasten the proceedings if  
4 someone feels that they want to follow a pleading  
5 cycle.

6 Mr. Lutzker?

7 MR. LUTZKER: As you know, I've been away.  
8 The documents were served today. I got in and sort of  
9 hurriedly looked at them. I don't have a reaction yet  
10 regarding this.

11 JUDGE CAMPBELL: Well, I think it's fair  
12 to give you the time

13 MR. LUTZKER: I appreciate it.

14 JUDGE CAMPBELL: -- that is normally given  
15 by --

16 MR. LUTZKER: I mean, I may be prepared to  
17 deal with our motion. I don't want to prejudge it,  
18 because I've got to see what was really said. In  
19 terms of the other -- I haven't even read the other  
20 documents, because just getting over here --

21 JUDGE CAMPBELL: Well, I think it would be  
22 fair to all parties --

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1 JUDGE COOLEY: It's quite short.

2 MR. LUTZKER: I mean, maybe, you know --

3 JUDGE CAMPBELL: Why don't we do this:  
4 We'll proceed with the ones we know we're going to do.  
5 If by the middle of the day, break tomorrow, either  
6 one of you feel like you can both charge ahead and you  
7 both agree and we have time, then we can reserve that  
8 time for the motions that are recently filed. If on  
9 the other hand, either one of you feel that you need  
10 extra time to complete the pleading cycle, that is  
11 certainly appropriate. Is that satisfactory?

12 MR. TUCCI: That's fine.

13 MR. LUTZKER: Yes.

14 JUDGE CAMPBELL: Anything else? Thank you  
15 all for your participation today, and we will adjourn  
16 until tomorrow morning at 9:30. We appreciate your  
17 extra efforts at answering all questions thoroughly  
18 and being completely gracious about it all the way  
19 through. We will see you tomorrow. Thank you.

20 (Whereupon, the conference recessed at  
21 6:04 p.m. to reconvene at 9:30 a.m., December 12,  
22 2000.)

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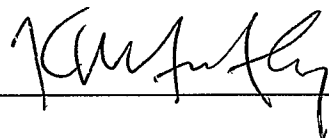
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Copyright Arbitration Royalty Panel

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Place: Washington, DC

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